Supreme Court, U.S.
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No._____

In The

Supreme Court of the United States

EDWARD VEGA,

Petitioner,

v.

FLOYD H. MILLER, JAMES C. DESIMONE, HOWARD L. ENGLISH, CAROLYN D. JONES, and G. PETER COONEY,

Respondents.

On Petition for a Writ of *Certiorari*
To The United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED FOR REVIEW

(1) Is a state defendant automatically shielded from all liability arising from a course of conduct if he or she has a qualified immunity defense to any one legal claim arising from the conduct?

(2) Is there a content-based restriction for First Amendment purposes between academic speech concerning political matters as opposed to academic speech concerning other matters?

PARTIES TO PROCEEDING

The Petitioner in this Court, Professor Edward Vega, is an individual who was the plaintiff in the District Court and the appellee in the Court of Appeals. The Respondents, Floyd H. Miller, James C. DeSimone, Howard L. English, Carolyn D. Jones, G. Peter Cooney are all individuals who were the defendants in the District Court and the appellants in the Court of Appeals.

The State University of New York Board of Trustees, the State University of New York Maritime College and the Faculty Student Association of SUNY Maritime College are public educational institutions. They were defendants in the District Court but were not parties in the Court of Appeals and are not respondents in this Court. Hope Becker and Joan Api are individuals. They were defendants in the District Court but were not parties in the Court of Appeals and are not respondents in this Court.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISIDICTION 2

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 6

I. PROFESSOR VEGA'S PETITION FOR *CERTIORARI* SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL QUALIFIED IMMUNITY LAW THAT SHOULD BE DECIDED BY THIS COURT. 7

A. A Court Must Assess Each Constitutional Claim Even if the Defendant has a Qualified Immunity Defense to One Claim 9

B. The Second Circuit's Novel Rule is in Conflict with the Qualified Immunity Analysis Adopted by Other Courts of Appeals 12

Page

II. THE PETITION FOR *CERTIORARI* SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S DECISION THAT ACADEMIC SPEECH MUST BE POLITICAL TO BE PROTECTED BY THE FIRST AMENDMENT IS A DANGEROUS DEPARTURE FROM ESTABLISHED SUPREME COURT PRECEDENT. 15

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Adler v. Pataki, 185 F.3d 35 (2d Cir. 1999) 10

Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S. Ct. 766 (1942) 18

Chesser v. Sparks , 248 F.3d 1117 (11th Cir. 2001) 12, 14

Croixland Props. Ltd. P'ship v. Corcoran, 174 F.3d 213 (D.C. Cir. 1999), cert. denied, 528 U.S. 1021 (1999) 10

Dube v. State University of New York, 900 F.2d 587 (2d Cir. 1990) 15, 16

Gardenshire v. Schubert, 205 F.3d 303 (6th Cir. 2000) 12

Gruenke v. Seip, 225 F.3d 290 (3d Cir. 2000) 12, 13, 14

Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562 (1988) 16

Keyishian v. Board of Regents, 385 U.S. 589, 87 S. Ct. 675, 87 S. Ct. 675 (1967) 17, 23

May v. Sheahan, 226 F.3d 876 (7th Cir. 2000) 12, 13

National Commodity and Barter Ass'n v. Archer, 31 F.3d 1521 (10th Cir. 1994) 12, 13

Pratt v. Independent Sch. Dist. No. 831, Forest Lake MN, 670 F.2d 771 (8th Cir. 1982) 21

Page

Regents of Univ. of Calif. v. Bakke,
438 U.S. 265, 98 S. Ct. 2733 (1978) 18

Roth v. United States,
354 U.S. 476, 77 S. Ct. 1304 (1957) 17, 18, 22

Stachura v. Truszkowski, 763 F.2d 211 (6th Cir. 1985),
rev'd and remanded on issue related to
attorney's fees sub, 477 U.S. 299 (1986) 21

Sweezy v. New Hampshire,
354 U.S. 234, 77 S. Ct. 1203 (1957) 18

Thomas v. Collins, 323 U.S. 516, 65 S. Ct 315 (1945) 19

Thornhill v. Alabama, 310 U.S. 88, 60 S. Ct. 736 (1940) 19

Tinker v. Des Moines Indep. Cmty. Sch. Dist.,
393 U.S. 503, 89 S. Ct. 733 (1969) 18

United Mine Workers of America, Dist. 12 v.
Illinois State Bar Ass'n,
389 U.S. 217, 88 S. Ct. 353 (1967) 18

United States v. Playboy Entertainment Group, Inc.,
529 U.S. 803, 120 S. Ct. 1878 (2000) 19, 20

Vega v. Miller, 273 F.3d 460 (2d Cir. 2001) ..... *passim*

Wooley v. City of Baton Rouge,
211 F.3d 913 (5th Cir. 2000) 12, 13, 14, 15

CONSTITUTIONAL PROVISIONS, STATUTES and RULES

U.S. Const. Amendment I ..... *passim*

Page

42 U.S.C. 1983 ..... *passim*

28 U.S.C. § 1254 2

28 U.S.C. § 1331 2

Fed. R. Civ. P. 8(e)(2) 9, 10

OTHER AUTHORITIES

Catherine A. MacKinnon,
Points Against Postmodernism,
75 Chi.-Kent L. Rev. 687 (2000) 21

16a Am. Jur. 2d *Constitutional Law* § 497 (1998) 19

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Respondents.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Professor Edward Vega respectfully petitions for a writ of *certiorari* to review the November 29, 2001, judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

Petitioner seeks review of the opinion of the United States Court of Appeals for the Second Circuit reversing the District Court's decision denying Respondents' motion for summary judgment and Judge Cabranes's dissenting opinion reported at Vega v. Miller, 273 F.3d 460 (2d Cir. 2001), which is reproduced in the appendix at A.1.

The transcript of the decision of the District Court (Cote, J.) issued from the bench on September 7, 2000,

denying respondents' motion for summary judgment, is reproduced in the appendix at A.40.

JURISIDICTION

This petition asks the Court to review the November 29, 2001, opinion and judgment of the United States Court of Appeals for the Second Circuit. By order filed on January 8, 2002, the Court of Appeals denied the Petitioner's petition for rehearing and rehearing *en banc*. The order denying rehearing is reprinted in the appendix at A.73. This petition is timely filed within 90 days of that order.

Petitioner first invoked federal court jurisdiction in this case pursuant to 28 U.S.C. § 1331. Should the Court grant *certiorari*, this Court's jurisdiction would rest on 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

United States Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

42 U.S.C. 1983 (excerpt):

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State. . . , subjects, or causes to be subjected, any citizen of the United States of other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

STATEMENT OF THE CASE

Petitioner Professor Vega was hired by the State University of New York - Maritime Campus ("Maritime"), a state merchant-marine college, in the fall of 1993 as an adjunct assistant professor to teach freshman English composition and writing. On July 21, 1994, during a basic composition class for high school graduates who had been admitted to matriculate at Maritime in the fall, Professor Vega facilitated a ten-minute, in-class brainstorming exercise that required students to brainstorm freely, without censorship, on a subject of their choice. This widely accepted teaching method -- called "clustering" -- is designed to reduce the repetitive use of words and ideas in students' writing.

Professor Vega asked the students themselves to select the subject of the exercise to ensure that the topic reflected the students' own interests. By an overwhelming margin, the students chose "sex," which Professor Vega cautiously modified to "sex/relationships." Professor Vega invited the students to "brainstorm" on the topic for a few minutes as he wrote the students' ideas on a blackboard "in a graph representing clusters of related ideas."

Most students contributed thoughts on love and marriage, child rearing, and sexually transmitted diseases. A handful of students, however, used sexually explicit language to express their ideas. Professor Vega neither encouraged the students to use profane language nor did he write all of the sexually explicit terms on the blackboard, but

instead used initials to represent the more explicit terms. When the five-minute period ended, Professor Vega erased those initials and explicitly cautioned his students that such language "would alienate their readers and should not be used at all or rarely and then only where it was essential to enlighten and persuade the reader." None of the students, the students' parents or other faculty or staff ever complained about the July 21st class, either before, during or after the exercise.

Four weeks later, Respondents learned of the classroom exercise. Respondent Harold L. English met with Professor Vega and accused him of sexually harassing students, using sexually explicit and pornographic language in class, writing obscenities on the classroom blackboard, creating a liability for Maritime, and posing a physical danger to the students. Professor Vega later met with Respondent Admiral Floyd H. Miller on August 24, 2000, and Admiral Miller berated Professor Vega for teaching pornography. Despite the lack of any complaints whatsoever – let alone the filing of a sexual harassment charge – Admiral Miller fired Professor Vega for violating Maritime's sexual harassment policy. Admiral Miller testified that in his "opinion and judgment, Mr. Vega subjected his 17 and 18 year old students to discomfort and humiliation by creating an intimidating, hostile and offensive environment in contravention of the sexual harassment policy of SUNY Maritime College" and that "in our sexual harassment policy, verbal sexually explicit language is considered sexual harassment and I wanted to make sure that [the "young girls" in Vega's class] were not sexually harassed."

Professor Vega brought two distinct First Amendment Claims arising out of his termination. *First*, Professor Vega claimed that the termination violated his First Amendment right to academic freedom. *Second*, he claimed

that he was terminated pursuant to a vague and overbroad sexual harassment policy.[1] The respondents claimed that they were entitled to summary judgment because they were immune from liability under the doctrine of qualified immunity. The District Court denied respondents' motion for summary judgment in full from the bench on September 7, 2000. Judge Cote concluded that the law with respect to each of Professor Vega's claims was clearly established and that the respondents were not protected by the qualified immunity defense.

In a 2-1 decision, the Second Circuit reversed the District Court and ruled that the law with respect to Professor Vega's First Amendment academic freedom claim was not clearly established in 1994. In a clear departure from prior precedent, the majority ruled that the speech in Professor Vega's classroom was not clearly protected by the First Amendment because it was not "political" in nature. (A.12.) In a sharp dissent, Judge Cabranes disagreed, reasoning that the Supreme Court had never held that the protections of the First Amendment were limited solely to political speech. (A.33-A.34.) (Cabranes, J., dissenting).

The Second Circuit simply never ruled on Professor Vega's claim that he was fired pursuant to a vague and overly broad sexual harassment policy. Instead, the Second Circuit reasoned that "since the Defendants have a qualified immunity defense from damages liability for a First Amendment academic freedom violation, it does not matter

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[1] In addition to his First Amendment claims, Professor Vega also claimed that the termination violated his right to due process under the stigma-plus theory. This claim was dismissed by the Court of Appeals for the Second Circuit. Professor Vega does not seek *certiorari* with respect to the due process theory.

whether they also thought [Professor Vega's conduct] violated the school's sexual harassment policy." (A.15-A16.)

REASONS FOR GRANTING THE PETITION

The decision of the Second Circuit is an unprecedented departure from principles of qualified immunity and the law regarding the First Amendment's protection of a professor's right to academic freedom. In dismissing both constitutional claims after determining that defendants had qualified immunity as to only one, the Second Circuit announced a new rule that gives state actors *carte blanche* immunity for constitutional and statutory violations when their conduct gives rise to multiple and distinct violations of law. This ruling is in conflict with the law in other circuits and an unprecedented assault on the rights of Section 1983 plaintiffs.

Furthermore, the Second Circuit deviated from this Court's many statements recognizing that the Constitution protects speech on all subjects by adopting a content-based restriction on the speech used during an assignment that, the Court of Appeals conceded was "initiated for legitimate pedagogical purposes." Such a content-based restriction will likely place a chill on speech in University classrooms.

Accordingly, the Petitioner, Professor Edward Vega, respectfully requests that the Supreme Court grant his petition for *certiorari*.

I.
PROFESSOR VEGA'S PETITION FOR *CERTIORARI* SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL QUALIFIED IMMUNITY LAW THAT SHOULD BE DECIDED BY THIS COURT.

This petition for *certiorari* should be granted because the Second Circuit has announced the novel rule that a defendant may be shielded from *all* liability arising from a course of conduct if he or she has a qualified immunity defense to *any one* legal claim arising from the conduct. This rule is an unprecedented departure from long standing principles of qualified immunity enshrined by this Court. If allowed to stand, this new rule will generate vast confusion in the lower courts and, if followed, could give state defendants a free pass on knowing unconstitutional conduct for which they would otherwise be liable.

Professor Vega asserted that his termination was a violation of his constitutional rights in two distinct claims: *first*, that it violated his First Amendment right to academic freedom, and *second*, that the termination was based on a sexual harassment policy that was unconstitutionally vague and overly broad. As such, the single act of terminating Professor Vega gave rise to two distinct First Amendment claims.

The Second Circuit simply never adjudicated Professor Vega's independent claim that he was terminated pursuant to a vague and overly broad sexual harassment policy in violation of the First Amendment. Rather, the Second Circuit announced as a matter of law that "where. . . there is only one conduct of the discharged employee that motivates the adverse action, and a defendant has qualified immunity for taking such action, the immunity is not lost

even if the defendant thinks that this same conduct also provides an additional reason for the adverse action." (A.16.)

According to this novel rule, the majority held:

> Since the Defendants have a qualified immunity defense from damages liability for a First Amendment academic freedom violation, it does not matter whether they not only thought that Professor Vega's conduct exceeded the proper bounds of a teacher's classroom conduct but also thought that it violated the College's sexual harassment policy. The conduct remains activity for which they may terminate him without incurring damages liability.

(A.15.)[2] Judge Cabranes disagreed, setting forth his reasoning in the following paragraph:

> For the majority, the inquiry ends once the defendants have shown that they are entitled to qualified immunity for their actions with respect to one claim. It does not matter to the majority whether Vega was fired because the defendants thought his conduct 'exceeded the proper bounds of a teacher's classroom conduct' or because they 'thought that it violated the College's sexual harassment policy.' In either case, the majority concludes, the defendants

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[2] In one passing paragraph of dicta, the Second Circuit noted that "[e]ven if Vega could show that it is relevant that the Defendants were partially motivated by the additional belief that his conduct violated the College's sexual harassment policy, we are satisfied that it would have been objectively reasonable for them to believe in 1994 that enforcing the policy against Vega did not deny him any constitutional right." (A.16-A.17.) Such passing dicta does not suffice for the constitutional review to which Professor Vega and other section 1983 plaintiffs are entitled.

> could fire Vega because Vega's conduct was not protected by principles of academic freedom rooted in the First Amendment. The majority is incorrect. Vega claims that he was fired *because* school administrators decided that his actions violated the college's policy on sexual harassment. Thus, a court considering Vega's lawsuit must determine whether that policy violates the First Amendment's prohibition of overbroad and vague speech restrictions.

(A.22-A.23.) (Cabranes, J., dissenting) (internal citations omitted).

A. A Court Must Assess Each Constitutional Claim Even if the Defendant has a Qualified Immunity Defense to One Claim.

The Second Circuit's decision ignores completely that Professor Vega brought two legally cognizable claims arising from his termination that must be evaluated independently, according to their separate merit. The rule announced by the Second Circuit in this case ignores that Professor Vega alleges two distinct wrongs arising from the same course of conduct. In effect, the Second Circuit has adopted a rule that precludes a civil rights plaintiff from pursuing multiple constitutional claims.

Such a rule violates the fundamental legal principle that one course of conduct may give rise to multiple and distinct violations of law – each of which rises or falls on its own merit. See, e.g., Fed. R. Civ. P. 8(e)(2) (providing that "[w]hen two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also

state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds."); Croixland Props. Ltd. P'ship v. Corcoran, 174 F.3d 213, 218 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 1021 (1999) (holding that the district court erred in dismissing a complaint in its entirety after dismissing only one of the alternate claims); Adler v. Pataki, 185 F.3d 35, 41 (2d Cir. 1999). Indeed, "the flexibility afforded by Rule 8(e)(2) is especially appropriate in civil rights cases," such as the case brought by Professor Vega, "in which complex inquiries into the parties' intent justifies raising multiple claims." Adler, 185 F.3d at 41 (internal citation omitted).

Here, rather than recognize that Professor Vega alleged two independent constitutional wrongs, the panel majority focused solely on the sexual harassment policy as a potential additional *justification* for defendants' conduct, having already found sufficient justification for Professor Vega's removal in its academic freedom analysis. (A.15-A.16.) ("we encounter an initial difficulty in understanding precisely what Vega contends this claim adds to his First Amendment academic freedom claim"). The majority thus incorrectly presumed that the claim concerning the school's sexual harassment policy was superfluous. The panel reasoned, "in view of the vulgarities that Vega permitted to be expressed, no reasonable jury could fail to find that the Defendants would have terminated Vega solely because they considered his conduct beyond the bounds of proper classroom performance, even if the College had no sexual harassment policy." (A.17.)

Under its novel interpretation of the scope of qualified immunity protection, the panel ignores that Professor Vega has alleged that he was fired because school administrators decided that his actions violated the college's

policy on sexual harassment which is vague and overbroad in violation of the First Amendment. As Judge Cabranes points out in dissent, Professor Vega has "*two independent* First Amendment claims against the college." (A.23.) (emphasis in original.) (Cabranes, J., dissenting.) Under the Second Circuit's new rule, a court may simply brush a section 1983 plaintiff's second or third constitutional claims aside and deny him or her the right to pursue multiple constitutional claims.

The Second Circuit's rule should not be allowed to propagate because it is impossible to enforce with any consistency. Under the new rule, a court may now focus on only one of plaintiff's constitutional claims - even if the defendant has knowingly violated the law. Accordingly, a court may do as the court did in this case - focus on the constitutional claim based on a right that is less established under the law than the other claims and use it to wipe out the remainder of plaintiff's claims. With such a rule in place, plaintiffs will be discouraged from coming forward with legal claims - especially novel ones -- out of fear that a less established one will wipe out the rest of his or her claims. Such a rule will serve as a deterrent to plaintiffs in pursuing their claims.

The Court should prevent this rule becoming law on the facts presented by this case. Here the majority chose to focus first on Professor Vega's academic freedom claim and found that it was not clearly established. But what if it had focused first on Professor Vega's claims that he was fired pursuant to a vague and overbroad sexual harassment policy? Both the District Court in this case and Judge Cabranes found that the law concerning vagueness and overbreadth was sufficiently clear in 1994 for a reasonable college administrator to recognize that the school's sexual harassment policy was vague and overbroad - both on its

face and as applied here. (A.28.) (Cabranes, J., dissenting); (Opinion of Judge Cote at A.67.) The rule should not be left to stand because it will be impossible to enforce in a fair and consistent manner. The resolution of a civil rights case should not be left to the whimsy of which claim is analyzed first.

If allowed to stand, the Second Circuit opinion will establish a startling new principle of law: once defendants have established their entitlement to qualified immunity for one claim brought by a plaintiff, they are insulated from all further liability arising from the same course of conduct - even if presented as separate, legally distinguishable claims in the complaint. This theory is such a radical departure from the current state of the law that it impels *certiorari* review by this Court.

B. The Second Circuit's Novel Rule is in Conflict with the Qualified Immunity Analysis Adopted by Other Courts of Appeals.

The Second Circuit's conclusion that defendants may be shielded from all liability arising from one course of conduct if they have a qualified immunity defense to any one claim is an unprecedented departure from long standing principles of qualified immunity. It is also in conflict with decisions of other United States Courts of Appeals. When faced with a qualified immunity defense to multiple constitutional claims based on the same conduct, Courts of Appeals analyze the qualified immunity defense separately as to each claim. See Chesser v. Sparks , 248 F.3d 1117 (11th Cir. 2001); May v. Sheahan, 226 F.3d 876 (7th Cir. 2000); Gruenke v. Seip, 225 F.3d 290 (3d Cir. 2000); Wooley v. City of Baton Rouge, 211 F.3d 913 (5th Cir. 2000); Gardenshire v. Schubert, 205 F.3d 303 (6th Cir. 2000); National Commodity and Barter Ass'n v. Archer, 31 F.3d 1521 (10th Cir. 1994).

In May v. Sheahan, for example, the Seventh Circuit addressed claims by a pre-trial detainee who alleged that the single act of shackling him to his hospital bed 24 hours a day violated three separate constitutional rights. The conduct allegedly violated the constitutional right to equal protection, the substantive due process right to be free from bodily restraint, and the right of access to the courts. May, 226 F.3d at 878-79. In denying the defendant's motion for summary judgment for qualified immunity, the Seventh Circuit conducted an independent analysis of each claim. Id. at 882-84.

Likewise, in Gruenke v. Seip, the Third Circuit examined a high school's qualified immunity defense to the claims of a student who alleged that the school's administration of a pregnancy test violated both her Fourth Amendment right to be free from unreasonable searches and seizures and her due process right to be free from disclosure of personal matters and medical information. 225 F.3d at 297. After separately considering whether the law as to each of plaintiff's constitutional claims was clearly established, the Third Circuit held that the defendant was not entitled to qualified immunity. Id. at 300-03.

Indeed, never has the inquiry to determine qualified immunity been confined to a single claim in a case where a plaintiff asserted a number of constitutional violations. On the contrary, other Courts of Appeals remand to District Courts when the lower court has failed to make a qualified immunity determination as to all of a plaintiff's constitutional claims. See e.g. Wooley, 212 F.3d at 920-25 (affirming district court's finding of no qualified immunity as to Wooley's Fourteenth Amendment claim and remanding to district court to determine whether defendants are entitled to qualified immunity for Wooley's Fourth Amendment claim); National Commodity and Barter Ass'n, 31 F.3d at 1532-35

(determining that the law regarding the First Amendment claim was "clearly established" but remanding to the lower court to determine whether defendants were entitled to qualified immunity for a Fourth Amendment claim).

Thus, when faced with a qualified immunity defense to multiple First Amendment claims, other Courts of Appeals analyze both claims separately. In Chesser v. Sparks, for example, the plaintiff alleged that she was terminated from her job in a county clerk's office for expressing her views about the office's overtime policy and for associating with her then-husband in violation of her First Amendment right of free speech and her right to freedom of association. 248 F.3d at 1121. The Eleventh Circuit determined that the defendant was entitled to qualified immunity after conducting an *independent* qualified immunity analysis for each of the First Amendment claims alleged. Id. at 1123-25.

Accordingly, where the constitutional right is not clearly established as to one claim, the plaintiff is not usually denied his or her right – as Professor Vega was here by the Second Circuit – to pursue his or her other claims. And, as other Circuits have found, even though a defendant is found to enjoy qualified immunity with regard to one or even a number of the separate claims brought by the plaintiff, the defendant may still be held liable for violating the plaintiff's other constitutional rights. See, e.g., Gruenke, 225 F.3d at 295 (denying in part defendant's motion for summary judgment after finding that he was entitled to qualified immunity with respect to one claim based on interference with the First Amendment right of association, but was not entitled to qualified immunity or summary judgment for the plaintiff's Fourth or Fourteenth Amendment claims); Wooley, 212 F.3d at 923, 925 (dismissing Wooley's substantive due process claim of familial privacy regarding her relationship with a child in her custody based on qualified immunity, but

remanding to the district court for a consideration of her Fourth Amendment claim).

The Court should grant Professor Vega's writ of *certiorari* because the Second Circuit Court of Appeals' decision is an unprecedented departure from qualified immunity law and conflicts with the decisions of other Court of Appeals to consider the same factual scenario.

II.
THE PETITION FOR *CERTIORARI* SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S DECISION THAT ACADEMIC SPEECH MUST BE POLITICAL TO BE PROTECTED BY THE FIRST AMENDMENT IS A DANGEROUS DEPARTURE FROM ESTABLISHED SUPREME COURT PRECEDENT.

The petition for *certiorari* should be granted because the decision below is a dangerous departure from established Supreme Court precedent. The majority in the Second Circuit upheld the dismissal of a public university professor merely because his students -- engaged in a discussion that the majority concedes was undertaken with legitimate pedagogical purpose (see A.12.) -- used words that the college administrators concluded were offensive.

The Second Circuit reversed the District Court in a 2-1 decision and held that Respondents were entitled to qualified immunity as to Professor Vega's claim that they terminated him in violation of his First Amendment right to academic freedom. The panel ruled,

> [a]lthough pre-1994 cases had outlined some guideposts concerning the free speech rights of a college professor to express his views, see Dube v. State University of New York, 900 F.2d 587 (2d Cir.

1990), and the free speech rights of students to express their views, see Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562, 98 L.Ed.2d 592 (1988), the available authorities did not settle with certainty the extent to which a college professor could be disciplined for permitting student speech in a classroom to exceed reasonable bounds of discourse. The authority of educational administrators to take actions 'reasonably related to legitimate pedagogical concerns,' id. at 273, 108 S. Ct. 562, leaves room for uncertainty."

(A.11.) The majority held that Professor Vega's speech was not protected by the First Amendment because, in the panel's view, Professor Vega's toleration of the students' vulgarities was far removed from the expression of "political" views. (A.12.) Accordingly, the Second Circuit held that because the subject matter of the speech was not, in its view, "political," it was not clearly established that it was protected by the First Amendment. In so holding, the Second Circuit effectively limited the protections of the First Amendment solely to political speech.

Judge Cabranes disagreed, reasoning that:

> [b]y 1990, [the Second Circuit] had 'clearly established' that state universities and their administrators were not entitled to qualified immunity when they sanctioned a college professor 'based on the content of his *classroom* discourse. . . . The majority dismisses Dube [v. State Univ. of New York, 900 F.2d 587 (2d Cir. 1990).] on the ground that Vega's 'toleration' of the students' 'shouted vulgarities' was 'far removed from Dube's expression of his political views.' In Dube, however, we did not condition First Amendment protection of academic

> freedom on the requirement that the speech in question itself be 'political' in nature. Nor has the Supreme Court held that the protections of the First Amendment are limited solely to political speech. See Roth v. United States, 354 U.S. 476, 484, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (1957).

(A.33-A.34.) (Cabranes, J., dissenting).

In this case, the Second Circuit drew an untenable distinction between speech they considered sexually explicit and speech that is purely of a "political" nature. This distinction, however, has never before been drawn by a United States Court of Appeals or by this Court. Indeed, the majority's distinction collides squarely with the prior holdings of this Court, which has never endorsed such a content-based dichotomy. Supreme Court First Amendment jurisprudence has repeatedly emphasized that the Constitution protects speech concerning a nearly limitless range of subjects, and has consistently refused to authorize content-based hierarchies within the realm of protected speech.

The Second Circuit's decision is especially pernicious because it places unjustifiable limits on speech that occurs in an academic environment. This Court has consistently recognized that the First Amendment protects the academic freedom of university professors. Over thirty years ago, this Court established a special protection for academic freedom: "That freedom is . . . a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Keyishian v. Board of Regents, 385 U.S. 589, 603, 87 S. Ct. 675, 683, 87 S. Ct. 675, 683 (1967) (internal citations and quotations marks omitted); see

also Sweezy v. New Hampshire, 354 U.S. 234, 251, 77 S. Ct. 1203, 1212 (1957) (holding that "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."). [3] This freedom extends to both student and teacher. See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506, 89 S. Ct. 733, 736 (1969).

The new "political content" requirement for protected speech established by the Second Circuit is a blatant departure from Supreme Court precedent.[4] This Court has stated in unequivocal terms that,

> the First Amendment does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.'

United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 223, 88 S. Ct. 353, 356 (1967) (quoting

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[3] See also Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 312, 98 S. Ct. 2733, 2759 (1978) (at the core of academic freedom is uninhibited intellectual inquiry and exchange - the atmosphere of speculation, experiment and creation - so essential to the quality of higher education) (quoting Sweezy v. New Hampshire, 354 U.S. at 263).

[4] Certainly, some forms of speech receive no First Amendment protection, or only limited protection. For example, obscenity and fighting words are not within the ambit of the First Amendment. See, e.g., Roth, 354 U.S. 476; Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S. Ct. 766 (1942). Significantly, it has never been alleged that the speech at issue here fits into any of these categories.

Thomas v. Collins, 323 U.S. 516, 531, 65 S. Ct. 315, 323 (1945)). This Court has consistently maintained that "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace *all issues* about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." Thornhill v. Alabama, 310 U.S. 88, 102, 60 S. Ct. 736, 744 (1940) (emphasis added); see also 16A Am. Jur. 2d *Constitutional Law* § 497 (1998) ("[T]he dissemination of various views may not be suppressed because they are unpopular, extreme, or controversial, annoying or distasteful, defiant or contemptuous, offensive to some hearers or viewers, or foolish and irresponsible.") (citing cases). The topic that Professor Vega and his students picked for the clustering exercise, "sex/relationships," undoubtedly can be considered a critical subject in contemporary society. Indeed, the Second Circuit itself acknowledged that the classroom exercise was "initiated for legitimate pedagogical purposes." (A.12.)

More recently, this Court has ruled that even "sexually explicit" cable television programming deserves robust First Amendment protection. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 808, 120 S. Ct. 1878, 1883 (2000). In Playboy, the Court proceeded from the assumption that Playboy's programming was "indecent," and that "many adults themselves would find [Playboy's programming] highly offensive." Id. At 811. However, the Court stated that "[a]s this case has been litigated, it not alleged to be obscene; adults have a constitutional right to view it." Id. Likewise, here the majority of the Second Circuit panel never held, and the Respondents never alleged, that the speech of Professor Vega's students was obscene. Yet, the majority nevertheless held that Professor Vega could be punished for allowing the students to articulate

provocative words, simply because their speech did not express what are, in their opinion, "political views." (A.12.)

Playboy rejected the idea that the First Amendment permits content-based distinctions regarding speech:

> The Constitution no more enforces a relativistic philosophy or moral nihilism than it does any other point of view. The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.

Id. at 818. Indeed, the very lesson that Professor Vega endeavored to teach his students may be characterized as how to make "esthetic and moral judgments . . . about literature." At the conclusion of the clustering exercise, he instructed his students that the more provocative terms they had mentioned "would alienate their readers and should not be used at all or used rarely and then only where it was essential to enlighten and persuade the reader." (A.4.)

The Second Circuit's decision will create an insidious chilling effect in university classrooms. Under this ruling, English instructors like Professor Vega dare not encourage frank discussions about some of the most renowned works of literature which contain sexually explicit language, whether they are classics like Sophocles's *Oedipus Rex* and Chaucer's *Canterbury Tales*, or modern novels such as Vladimir Nabokov's *Lolita* or Alice Walker's *The Color Purple*. In fact, the Second Circuit's opinion contributes to a preposterous conclusion that students or faculty could be disciplined just for reading or discussing the profane language contained in

such works. Furthermore, under a "political content" requirement, biology teachers could be punished for teaching evolution, health instructors could be reprimanded for teaching about human reproduction, and psychology professors could be sanctioned for allowing classroom debate on Freud.[5]

Thus, the Second Circuit's imposition of an unprecedented "political content" requirement should not be enshrined in law for at least two reasons. First, it is impossible to distinguish with any measure of rational consistency between speech that is purely "political" in nature and speech that addresses matters of human sexuality. Speech addressing matters such as sex or relationships has often been defined as a form of political speech. These subjects often overlap in ways that are subtle and implicit. For example, modern feminist theory was grounded in the premise that "the relation between knowledge and power [is] the central issue that women's situation and formal theory pose[] for each other, and that sexuality [is] where this issue [is] crucially played out." Catherine A. MacKinnon, *Points Against Postmodernism*, 75 Chi.-Kent L. Rev. 687, 687 (2000).

This question is of pressing national importance because under the Second Circuit's decision, a professor will be disciplined if, during the course of a legitimate pedagogical exercise, students use language that could be considered vulgar, provocative, or otherwise offensive to

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[5] These types of curricular choices have been protected by Courts of Appeal on academic freedom grounds. See, e.g., Stachura v. Truszkowski, 763 F.2d 211 (6th Cir. 1985), rev'd and remanded on issue related to attorney's fees sub nom. Memphis Comm. School District v. Stachura, 477 U.S. 299 (1986); Pratt v. Independent Sch. Dist. No. 831, Forest Lake MN, 670 F.2d 771 (8th Cir. 1982).

school administrators. Such results would run afoul of the doctrine this Court articulated in Roth, that

> [t]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . All ideas having even the slightest redeeming social importance - unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion - have the full protection of [the First Amendment] . . .

354 U.S. at 484. The Second Circuit may have found the students' comments rude, explicit or controversial, but it erred in holding them unprotected by the First Amendment.

In his dissenting opinion, Judge Cabranes warned of the dangerous precedent that the majority opinion established:

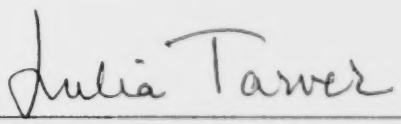
> The majority opinion, in my view, overlooks the First Amendment's prohibition of vague and overbroad restrictions on speech and undermines its protection of academic freedom as clearly established by the Supreme Court .... Today, the loser is a college teacher in a conservative academic setting who used an 'alternative' teaching technique with profane effect. In the future, the major losers are likely to be 'traditionalist' and unconventional college teachers, whose method or speech is found offensive by those who usually dominate our institutions of high learning. The First Amendment, with its 'special concern' for academic freedom, must protect all college teachers, especially in the performance of their most important duty - teaching in the classroom.

(A.20-A.21 (quoting Keyishian, 385 U.S. at 603).) If the Second Circuit's decision is permitted to stand, the academic freedom of professors and the free exchange of ideas in the classroom are at risk.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of *certiorari* and reverse the judgment below.

Respectfully submitted,



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APPENDIX

A.1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2000

Argued: May 3, 2001 Decided: November 29, 2001

Docket No. 00-9214

EDWARD VEGA,

Plaintiff-Appellee,

v.

FLOYD H. MILLER, JAMES C. DESIMONE, HOWARD L. ENGLISH, CAROLYN D. JONES, and G. PETER COONEY,

Defendants-Appellants.

Before: NEWMAN and CABRANES, Circuit Judges; and UNDERHILL,* District Judge.

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* Honorable Stefan R. Underhill of the United States District Court for the District of Connecticut, sitting by designation.

Appeal from the September 11, 2000, ruling of the United States District Court for the Southern District of New York (Denise L. Cote, District Judge), denying Defendants-Appellants' motion for summary judgment on the ground of qualified immunity.

Reversed and remanded with directions to dismiss the complaint.

Judge JOSE A. CABRANES dissents in a separate opinion.

JON O. NEWMAN, Circuit Judge.

This appeal concerns the availability of a qualified immunity defense for five administrators at the New York Maritime College ("College") who discharged a non-tenured teacher for leading a classroom "word association" exercise. The administrators concluded that the teacher had acted unprofessionally when he failed to terminate the exercise in which students, some standing on chairs, shouted out vulgar, sexually explicit terms, many of which the teacher wrote down, in words or initials, on a blackboard. The administrators appeal from the September 11, 2000, order of the District Court for the Southern District of New York (Denise L. Cote, District Judge) denying their motion for summary judgment on the ground of qualified immunity. Without deciding whether the discharge of the Plaintiff, Professor Edward Vega, might have entitled him to any relief from the College that would not encounter Eleventh Amendment obstacles,[1] we conclude that qualified immunity shields the administrators from any obligation to pay Vega

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[1] Vega acknowledges that after his termination from the Maritime College, he was offered employment at Palm Beach Community College.

any money damages. We therefore reverse and remand with directions to dismiss.

Background

The College is a state-run co-educational institution that aims to prepare its students--or as the College calls them, "cadets"--for service as engineers or officers in various branches of the armed services. It requires its students to demonstrate "[r]espect for others" and "regimental discipline at all times." Plaintiff-Appellee Edward Vega began teaching at the College in August 1993. He was a non-tenure-track professor, and could be terminated at will.

In the summer of 1994, Vega taught a six-week composition course at the College's Summer Institute, a program designed for pre-freshmen who need remedial courses prior to matriculation. The students were male and female, aged 17 and 18. On July 21, Vega conducted a free-association exercise called "clustering," in which students were invited to select a topic, then call out words related to the topic, and finally group related words together into "clusters." According to Vega, the exercise is intended to help students reduce the use of repetitive words in college-level essays.

The students selected "sex" as the topic for the "clustering" exercise. Vega understood the topic to be "sex and relationships." "Vega then invited the students to call out words or phrases related to the topic, and he wrote at least many of their responses on the blackboard. The first words called out were, as Vega described them, "very safe words," such as "marriage," "children," and "wedding ring." As the exercise continued, the words called out included "penis," "vagina," "fellatio," and "cunnilingus." Toward the end of the exercise, with all but one of the students yelling and two standing on chairs, the following words and phrases were

called out: "cluster fuck," "slamhole," "bearded clam," "fist fucking," "studded rubbers," "your [sic] so hard," and "eating girls out."[2]

Vega wrote many of the words on the blackboard, but said that he used initials for "some of the words that [Admiral] Floyd Miller [President of Maritime College] found to be disgusting examples of sexual harassment," and "some I didn't even abbreviate." At no point in the session did Vega seek to curtail the vulgarity of what the students were yelling, or terminate the exercise. He contends that after the exercise he "cautioned [the] students that such terms would alienate their readers and should not be used at all or used rarely and then only where it was essential to enlighten and persuade the reader." Complaint ¶ 17.

None of the students or their parents ever complained about the exercise. It came to the attention of the College administrators in the course of investigating a complaint by a student on another matter.

When the College administrators became aware of the clustering exercise, Admiral Miller asked Dr. Howard L. English, Vice-President of Academic Affairs, to meet with Vega. English and Dean of Admissions G. Peter Cooney confronted Vega on August 17. Vega handed English copies of his lesson plans, which included many provocative topics.[3] English explained that he and Miller found the clustering

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[2] The words and phrases were written down by a resident advisor assigned to attend Vega's class and tutor students, and his notes are in the record.

[3] For example, a list of final essay topics included "Women who get raped usually deserve it" and "Mentally retarded people should be gassed."

exercise inappropriate, and that it opened the door to bad publicity and possible sexual harassment complaints. English told Vega that they would not offer him reappointment for the upcoming school year.

English officially terminated Vega's contract by correspondence dated August 18, 1994. English drafted a memorandum to the file that explained Vega's firing, attributing it to Vega's "reliance on sex as a theme" and "use of sexually explicit vocabulary" in the clustering exercise. English claims that he also wrote a very brief memo (without an explanation for the firing) for Vega's personnel file.[4]

Miller met with Vega on August 24 to review the decision. Miller called Vega's conduct "vile," "vulgar," "pornographic," and "irresponsible," and told Vega that it could be considered sexual harassment, and could create liability for the college. Miller ratified English's termination of Vega. Both English and Miller acknowledge that the sole reason they decided to fire Vega was because of his conduct in the July 21, 1994, clustering exercise.

On August 3, 1997, Vega filed a suit in the District Court, alleging numerous causes of action against several administrators and various school entities.

Over the next several months, Judge Cote dismissed the complaint in its entirety against many of the Defendants, and

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[4] English claims that the memo to the file was placed only in the vice-president's personal file (which would be accessible only to English and successor vice-presidents), because he did not want it to impair Vega's prospects for future employment. However, Vega testified that the Defendants' attorney said otherwise in the state court proceedings, maintaining that she found the memo in Vega's personnel file, an allegation we accept for purposes of this appeal.

dismissed some of the claims against the remaining Defendants. However, she denied motions to dismiss three of the claims against five of the Defendants, Appellants on this appeal. They are Admiral Miller, Vice-President English, Dean Cooney, James C. DeSimone, Commandant of Cadets, and Carolyn D. Jones, Director of the Summer Institute.

The remaining claims are all brought under 42 U.S.C. § 1983. They allege that the decision not to reappoint Vega (1) violated his First Amendment right to academic freedom (the "academic freedom claim"), (2) was made pursuant to an unconstitutionally vague or overbroad sexual harassment policy (the "sexual harassment policy claim"), and (3) infringed his Fourteenth Amendment due process right to a hearing prior to governmental adverse employment action that sullies his good name and reputation (the "stigma-plus claim").

The Defendants first filed a motion to dismiss on November 10, 1997, arguing, among other things, that they were entitled to qualified immunity on the ground that the law concerning Vega's claims was not clearly established in 1994. Judge Cote denied this motion, ruling that the law as to both the academic freedom claim and the stigma-plus claim was clearly established in 1994, and that the question of whether the Defendants' sexual harassment policy was unconstitutionally vague or overbroad was a "fact intensive one that cannot be resolved on a motion to dismiss." *Vega v. State University of New York Board of Trustees*, 67 F. Supp. 2d 324, 341 (S.D.N.Y. 1999). The Defendants did not appeal this decision.

After the close of discovery, the Defendants moved for summary judgment, arguing that there was insufficient evidence to support the Plaintiff's claims and that they were

protected against claims for money damages by qualified immunity. On Sept. 7, 2000, Judge Cote denied the summary judgment motion from the bench. On the "academic freedom" claim, she ruled that an issue of fact remained as to the relationship between "clustering" and Vega's educational objective and as to the "context and manner" of the classroom exercise. On the "sexual harassment policy" claim, she ruled that there was a factual issue as to whether Vega was terminated pursuant to the policy, that she could not rule as a matter of law that the policy was not unconstitutionally vague or overbroad, and that qualified immunity was not available on this claim because cases such as *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967), and *Dube v. State University of New York*, 900 F.2d 587 (2d Cir. 1990), "clearly establish Vega's right to be free from enforcement of a [College] policy that constitutes on its face or as applied a vague or overbroad restriction on classroom speech." She distinguished a Ninth Circuit case that had afforded qualified immunity to defendants in similar circumstances, *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996), because the policy in that case was "different and narrower" than the one at issue here. Judge Cote also found fact questions as to Vega's stigma-plus claim: whether stigmatizing statements were made "in the course of Vega's termination" and whether the statements were publicized.

Discussion

I. Appellate Jurisdiction

Acknowledging that the denial of a qualified immunity defense is subject to an interlocutory appeal when the appeal can be decided as a matter of law, *see Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), Vega

nonetheless contends that the Defendants are barred from filing the present appeal from the September 2000 ruling denying their motion for summary judgment based on qualified immunity because they did not appeal the September 1999 ruling denying their earlier Rule 12(b)(6) motion to dismiss on the basis of qualified immunity. Vega maintains that the pending appeal, if permitted, would amount to an end-run around the 30-day time requirement in Rule 4 of the Federal Rules of Appellate Procedure, since a defendant who was late in appealing from a Rule 12(b)(6) denial could theoretically obtain a new 30-day clock simply by filing another motion for qualified immunity.

There are three possible approaches to the availability of an interlocutory appeal from a trial court's second denial of a motion asserting an immunity defense: a defendant could be permitted to appeal the second denial (a) only if he did not appeal the first denial, (b) only if he did appeal the first denial, or (c) regardless of whether he appealed the first denial.

If the motion that results in the second denial is virtually a reprise of the motion that was denied the first time, there is a substantial argument for dismissing the appeal of the second motion as an evasion of the appellate timeliness requirement. *See Armstrong v. Texas State Board of Barber Examiners*, 30 F.3d 643, 644 (5th Cir. 1994) (appeal from denial of second qualified immunity motion dismissed where "the two motions are substantially the same"); *Taylor v. Carter*, 960 F.2d 763, 764 (8th Cir. 1992) (same).

However, the Supreme Court has ruled that an appeal will lie from a rejection of qualified immunity on a motion for summary judgment, notwithstanding a previous unsuccessful appeal from a rejection of the defense on a

motion to dismiss at the pleading stage. *Behrens v. Pelletier*, 516 U.S. 299, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996). The Court rejected the arguments that one "judiciously timed" appeal--either at the motion to dismiss stage or at summary judgment--is sufficient and that the availability of multiple appeals will simply delay the proceedings. The Court reasoned that multiple appeals will often be necessary due to the different posture of the case at the pleading stage and at summary judgment, and that if necessary, "[i]t is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims." *Id.* at 309-10, 116 S.Ct. 834.

Behrens makes clear that an appeal is available from denials of an immunity defense at both the pleading and summary judgment stages, and nothing in that decision suggests that a defendant is required to appeal an initial denial at the pleading stage in order to appeal a subsequent denial on summary judgment. Such an approach would precipitate many needless appeals. *See Grant v. City of Pittsburgh*, 98 F.3d 116, 121 (3d Cir. 1996) (declining to adopt "rule that would dramatically increase the number of interlocutory appeals at the dismissal stage"). Moreover, even the dissenters in *Behrens*, who favored permitting only one appeal, noted that a defendant could decline to appeal from a denial of their defense at the pleading stage and appeal the subsequent denial at the summary judgment stage. *See Behrens*, 516 U.S. at 323, 116 S.Ct. 834 (Breyer, J., with whom Stevens, J., joins, dissenting).

In the pending case, even though there is some overlap between the contentions made in the Defendants' first and second assertions of the qualified immunity defense, the second motion differs from the first in that it relies on matters developed during discovery. The denial of that

motion is appealable, notwithstanding the absence of an appeal at the pleading stage. *See Grant*, 116 F.3d at 120.

II. Qualified Immunity

Government officials are "'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Wilson v. Layne*, 526 U.S. 603, 614, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). The qualified immunity defense requires consideration of the clarity of the law establishing the right allegedly violated and whether a reasonable person, acting under the circumstances then confronting a defendant, would have understood that the applicable law was being violated. These inquiries combine to form a standard that the Supreme Court has called "objective legal reasonableness," *Behrens*, 516 U.S. at 306, 116 S.Ct. 834; *Harlow*, 457 U.S. at 819, 102 S.Ct. 2727, that is, whether it was objectively reasonable for a defendant to think that the challenged conduct did not violate the plaintiff's clearly established rights. *See Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). We apply this standard to each of Vega's claims, viewing the evidence at this stage from the standpoint of the Plaintiff. *See Salim v. Proulx*, 93 F. 3d 86, 90-91 (2d Cir. 1996).

Although Vega contends that there are numerous factual issues that preclude summary judgment on the issue of qualified immunity, we adjudicate this appeal on the basis of the facts that are either admitted by Vega, or presented by the Defendants in sworn affidavits or depositions and not contested by any opposing affidavit. The critical undisputed facts are the words and phrases called out by the students

during the clustering exercise that Vega invited and permitted to continue.[5]

A. Academic Freedom Claim

It has been clear long before 1994, when the Defendants' termination of Vega occurred, that neither teachers nor students "shed their constitutional rights to freedom of speech . . . at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Although pre-1994 cases had outlined some guideposts concerning the free speech rights of a college professor to express his views in a classroom, *see Dube v. State University of New York*, 900 F.2d 587 (2d Cir. 1990), and the free speech rights of students to express their views, *see Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), the available authorities did not settle with certainty the extent to which a college professor could be disciplined for permitting student speech in a classroom to exceed reasonable bounds of discourse. The authority of educational administrators to take actions "reasonably related to legitimate pedagogical concerns," *id.* at 273, 108 S.Ct. 562, leaves room for uncertainty. Two years after the action challenged in this case, the Ninth Circuit observed that "[n]either the Supreme Court nor this Circuit has determined what scope of First Amendment protection is to be given a public college professor's classroom speech." *Cohen*, 92 F.3d at 971.

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[5] In his deposition, Vega said that "[n]ot all" of the words in the notes made by the resident advisor during the clustering exercise were called out by students, but he has made no claim that numerous vulgar words and phrases, as recorded in the advisor's notes, were not called out, including those that Vega said Admiral Miller found to be disgusting.

In the pending case, a college teacher has been disciplined for permitting a classroom exercise, initiated for legitimate pedagogical purposes, to continue to the point and beyond where students are calling out a series of vulgar, sexually explicit words and phrases, many of which the professor writes on the blackboard, either in words or with initials. We must determine whether, in light of then-existing law, college administrators could reasonably believe that they were not violating the teacher's First Amendment rights by disciplining him for such conduct.

Not surprisingly, no decision before 1994 (and none since) had clearly established that dismissal for conduct of the sort that Vega undisputedly took violated a teacher's First Amendment rights. Although qualified immunity is not available simply because the precise conduct at issue has not been previously held unlawful, *see Anderson*, 483 U.S. at 640, 107 S.Ct. 3034, the available precedents that might usefully have guided the Defendants leave the unlawfulness of their action at least unclear. *Dube*, much relied on by the Plaintiff, upheld the right of a teacher, in a course on racism, to express the view that Zionism was a form of racism. *See Dube*, 900 F.2d at 589, 598. Protection was accorded despite the offensiveness of the teacher's viewpoint to some students and some members of the community. *Dube* serves as a caution to governmental administrators not to discipline a college teacher for expressing controversial, even offensive, views lest a "pall of orthodoxy" inhibit the free exchange of ideas in the classroom. *See Keyishian*, 385 U.S. at 603, 87 S.Ct. 675. Vega's toleration of the students' shouted vulgarities was far removed from Dube's expression of his political views.

Somewhat more pertinent is the decision of the First Circuit in *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969). A teacher

was protected in assigning to a high school senior English class a scholarly article that used the word "mother-fucker" and explained its origin. *See id.* at 360-61. The teacher was careful to offer an alternate assignment to any student who found the assigned material offensive. *See id.* at 361. *Keefe* makes clear that a teacher may not be disciplined simply because a vulgar word is contained and discussed in assigned materials, at least for students of suitable age. A contrary decision would have left teachers vulnerable to discipline for assigning many well regarded literary works. However, the vulgarities Vega permitted to be called out in his classroom were not part of an etymological exploration, nor was the scene in which all of the students but one were yelling their contributions, with two standing on chairs, an academic discussion.

Particularly pertinent is our Circuit's decision in *Silano v. Sag Harbor Union Free School District Board*, 42 F.3d 719 (2d Cir. 1994), decided the same year as the episode at issue here.[6] A teacher was denied protection because of the materials he included in a tenth-grade mathematics class for the purpose of illustrating what he called the "persistence of vision" phenomenon. *See id.* at 721. Of the six 35 mm. film clips he distributed to his students, one portrayed two women naked above the waist. *See id.* We ruled that the school officials' action in barring the teacher from the classroom was "reasonably related to legitimate pedagogical concerns." *Id.*

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[6] The decision in *Silano* was rendered a few months after the Defendants terminated Vega. Nevertheless, because it is the most relevant contemporaneous authority, we include it in our consideration of established law because it helpfully indicates how three appellate judges regarded the applicable law at about the time the Defendants in this case are alleged to have been objectively unreasonable in thinking that they were acting lawfully.

at 723. We pointed out that "[d]epictions of bare-chested women were entirely unnecessary to illustrate th[e] scientific phenomenon" that the teacher wished to explain. *Id.* Although Vega's students were high school graduates in a pre-college program and thus two years beyond those in *Sag Harbor*, the students' shouting of vulgarities was as unnecessary to his "clustering" exercise as Silano's film clip was to his explanation of a scientific phenomenon.[7]

Since this episode occurred seven years ago and involves a highly unusual set of circumstances, unlikely to be repeated, we see no reason to rule definitively on whether the Defendants' action was unlawful. For purposes of the pending appeal, we rule only that on the state of the law in 1994, the Defendants could reasonably believe that in disciplining Vega for not exercising professional judgment to terminate the episode, they were not violating his clearly established First Amendment academic freedom rights. Even though no students complained, what students will silently endure is not the measure of what a college must tolerate or what administrators may reasonably think that a college need not tolerate.

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[7] In denying summary judgment, Judge Cote relied on an English professor's affidavit asserting that permitting and encouraging students to call out anything suggested by a topic is essential to a clustering exercise. This professor's view of the general value of permitting students to call out whatever is suggested by a topic does not create a factual issue as to whether the administrators were objectively reasonable in believing that Vega acted unprofessionally in permitting the clustering exercise on the topic of sex and relationships to continue with the calling out of a string of vulgarities.

B. Sexual Harassment Policy Claim

In considering the sexual harassment policy claim, we encounter an initial difficulty in understanding precisely what Vega contends this claim adds to his First Amendment academic freedom claim. He maintains, and there is no basis for any dispute, that he was terminated because of his conduct in permitting the clustering exercise to continue.[8] Vega's academic freedom claim asserts that the First Amendment prevented the Defendants from disciplining him for this conduct, and we have ruled above that, whether or not that claim is valid, the Defendants were objectively reasonable in believing that it did not. Since the Defendants have a qualified immunity defense from damages liability for a First Amendment academic freedom violation, it does not matter whether they not only thought that Vega's conduct exceeded the proper bounds of a teacher's classroom conduct but also thought that it violated the College's sexual harassment policy. The conduct remains activity for which they may terminate him without incurring damages liability.

This is not a case of dual motivation in which a plaintiff contends that adverse action was taken for an impermissible reason, *e.g.*, exercising First Amendment rights by providing information to a radio station, and the defendant contends that the action was taken for a different, permissible reason, *e.g.*, using obscene gestures to correct students, *See Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 281-83 & n.1, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). In such circumstances, if the evidence shows that the impermissible reason was a "motivating factor" of the

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[8] In a post-argument submission, he asserted that "the real reason for his termination was the in-class brainstorming exercise." Letter from Laura A. Menninger to this Panel 3 n.2 (May 14, 2001).

adverse action, the defendant is liable unless it can show that it would have taken the adverse action in the absence of the impermissible reason. *Id.* at 287, 97 S.Ct. 568. But where, as here, there is only one conduct of the discharged employee that motivates the adverse action, and a defendant has qualified immunity for taking such action, the immunity is not lost even if the defendant thinks that this same conduct also provides an additional reason for the adverse action. To take an extreme example, if a teacher ordered a female student to disrobe in front of a class and was fired because the school administrator reasonably concluded that such conduct was not related to a legitimate pedagogical purpose, the administrator would not lose qualified immunity just because of an additional belief that the teacher's conduct also violated the school's sexual harassment policy, no matter how impermissibly vague or overbroad that policy was.[9]

Even if Vega could show that it is relevant that the Defendants were partially motivated by the additional belief that his conduct violated the College's sexual harassment policy, we are satisfied that it would have been objectively reasonable for them to believe in 1994 that enforcing the policy against Vega did not deny him any constitutional right.[10] In 1996, two years after Vega's termination, the Ninth Circuit held qualified immunity available to college

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[9] Of course, in this example, if the adverse action were motivated in part by a factor unrelated to the teacher's conduct, such as the teacher's race, then dual motivation analysis would be required.

[10] In 1994, the College's sexual harassment policy defined sexual harassment as any unwanted verbal or physical sexual advance, sexually explicit derogatory statements, or sexually discriminatory remarks made by someone in the workplace, which is offensive or objectionable to the recipient or which causes the recipient discomfort or humiliation, or which interferes with the recipient's job performance.

administrators for disciplining a tenured professor for violating a sexual harassment policy that violated the First Amendment. *Cohen*, 92 F.3d at 973. "The legal issues raised in this case are not readily discernible and the appropriate conclusion to each is not so clear that the officials should have known that their actions violated [the professor's] rights." *Id.*; *see also diLeo v. Greenfield*, 541 F.2d 949, 953 (2d Cir. 1976) (regulation permitting termination of teacher "for other due and sufficient cause" not unconstitutionally vague or overbroad as applied to teacher who made comments with sexual connotations to students). Moreover, in view of the vulgarities that Vega permitted to be expressed, no reasonable jury could fail to find that the Defendants would have terminated Vega solely because they considered his conduct beyond the bounds of proper classroom performance, even if the College had no sexual harassment policy.

C. Stigma-Plus Claim

Vega contends that he was denied a liberty interest without procedural due process, grounding his alleged interest on an allegation that the Defendants stigmatized him by making defamatory statements in the course of terminating his employment. The Supreme Court has made clear that the right to "notice and an opportunity to be heard" are prerequisites to government action--including employment termination--that places a "person's good name, reputation, honor, or integrity" at stake. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The charges must be made "public" by the government employer, *Brandt v. Board of Cooperative Educational Services*, 820 F.2d 42, 43 (2d Cir. 1987), the employee must allege that the charges are false, *id.*, and the alleged defamatory statements must be made "in the course

of" terminating the employment, *see Paul v. Davis*, 424 U.S. 693, 710, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976).[11]

Vega contends that he was stigmatized by both a memo that was placed in his personnel file and by oral statements of some of the Defendants. Whether or not the alleged stigmatizing statements occurred after Vega's termination, as the Defendants contend, or in the course of termination, as he contends, *see Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 144 (2d Cir. 1993) (liberty interest implicated only if defamatory statement made in the course of termination of employment), there was no violation of a federally protected right.

As to the memo, it merely reports Vice-President English's meeting with Vega on August 17, 1994, at which English asked Vega if the resident advisor's notes fairly reflected the content of the clustering exercise and Vega replied that they did. There is nothing false in the memo. As to the oral statements, Vega takes some liberties with the record in recounting them. For example, he contends that DeSimone and English "informed the entire department that Professor Vega was a pornographer and a sexual harasser." Brief for Appellee at 42. The cited record references to English's deposition reveal that "sexual harassing" was used only in a question put to English and not adopted in his answer, and that English accurately referred to the words used in the clustering exercise as "pornographic,"[12] but did not label Vega a pornographer. The only cited remark that appears to

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[11] Such a claim is often referred to as "stigma plus." *See, e.g., Neu v. Corcoran*, 869 F.2d 662, 667 (2d Cir. 1989).

[12] *See* Webster's Third New International Dictionary 1767 (1993) (defining "pornographic" as "descriptive or suggestive of lewdness").

be false is Admiral Miller's remark to English that Vega had drawn "dirty pictures." Even if a stigmatization claim could arise from a statement that a plaintiff had put dirty pictures on a blackboard when in fact he had placed dirty words there, there is no evidence that Miller's remark was conveyed to anyone other than his fellow administrator, English. *See White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1064 (2d Cir. 1993) (stating that no court had determined whether a stigma-plus claim could be grounded on a statement communicated only within a police department). The "stigma-plus" claim fails for lack of evidence. At a minimum, it was objectively reasonable for the Defendants to believe that their actions did not violate a clearly established federal right.

Conclusion

We do not decide whether termination of Vega's employment was an appropriate response to his allowing the classroom exercise to get out of hand, or whether some lesser sanction might have been sufficient. The issue for us is whether, on the undisputed facts of what occurred, the defendants are entitled to the defense of qualified immunity from his claims against them for money damages.[13] For all of

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[13] Our dissenting colleague vastly overstates our ruling and infers from his overstated version of it a dire threat to academic freedom. We share his appropriately high regard for academic freedom, but believe his apprehension is unfounded. In the first place, we are not adjudicating the lawfulness of Vega's discharge. We are ruling only that the college administrators, based on the state of the law when the discharge occurred in 1994, are protected by qualified immunity from personal liability for damages. Second, our ruling is not based on either the "topic" of Vega's teaching or his teaching "technique," 273 F.3d at 471 (Cabranes, J., dissenting). The case would be entirely different if Vega had been terminated simply because his "topic" was "sex and relationships" or because his "technique" involved a "clustering" exercise in which students

the reasons set forth above, the Order of the District Court is reversed, and the case is remanded with directions to dismiss the complaint against the Appellants.

JOSE A. CABRANES, Circuit Judge, dissenting.

I respectfully dissent.[14]

The majority opinion, in my view, overlooks the First Amendment's prohibition of vague and overbroad restrictions on speech and undermines its protection of academic freedom as clearly established by the Supreme Court. In finding that the defendants are entitled to qualified immunity, the majority opinion tells us that a college professor can be fired summarily for engaging in a classroom discussion with students when it reaches a topic that some college administrator either believes is in violation of a policy on sexual harassment, that is, upon examination, overbroad and vague, or deems to be beyond the "reasonable bounds of discourse," Majority Opinion at 466. Today the loser is a college teacher in a conservative academic setting who used an "alternative" teaching technique with profane effect. In the future, the major losers are likely to be "traditionalist"

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were invited to consider the appropriate grouping of relevant words or phrases. Vega was terminated because the administrators reasonably believed that he displayed poor professional judgment in permitting the exercise (which we acknowledge was "initiated for legitimate pedagogical purposes," 273 F. 3d at 467) to continue after it had become apparent that the students were persisting in calling out a series of vulgar, sexually explicit words and phrases. Our ruling poses no threat to "'traditionalist' and unconventional college teachers," 273 F.3d at 471 (Cabranes, J., dissenting).

[14] I concur in the majority's jurisdictional holding at 465-66 and in its disposition of plaintiff's "stigma-plus" claim at 469-71.

and unconventional college teachers, whose method or speech is found offensive by those who usually dominate our institutions of higher learning.[15] The First Amendment, with its "special concern" for academic freedom, *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967), must protect all college teachers, especially in the performance of their most important duty--teaching in the classroom.

My colleagues assert that they do not adjudicate "the lawfulness of Vega's discharge" because they "are ruling only that college administrators, based on the state of the law when the discharge occurred in 1994, are protected by qualified immunity from personal liability for damages." Majority Opinion at 471 n.13. It is, however, precisely the majority's view of the First Amendment that serves as the basis for its conclusion that the defendants are entitled to qualified immunity. Although "the lawfulness of Vega's discharge" is not specifically decided, the majority opinion does state its interpretation of the law, at least as it was in 1994, and by inference, as it may still be. I dissent because I disagree with the majority's interpretation of the law, as it was in 1994, and as it is today.

I

From the start, the majority opinion fundamentally misapprehends Vega's two First Amendment claims. Vega's first claim is grounded in the First Amendment's prohibition

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[15] The need to protect academic freedom on our college campuses is especially evident in the account of disheartening developments in the recent past given by Alan Charles Kors and Harvey A. Silverglate, commentators from both ends of the political spectrum, in THE SHADOW UNIVERSITY (1998). *See also* DAVID BROMWICH, POLITICS BY OTHER MEANS (1992) (describing the politicization of higher education).

of vague and overbroad restrictions on speech. Vega claims that he was discharged pursuant to an overbroad and vague college policy on sexual harassment.[16] *Second Amended Complaint* (filed June 26, 1998). ¶ 68 *See Vega v. State Univ. of N.Y. Bd. of Trs.*, 67 F. Supp. 2d 324, 341-342 (S.D.N.Y. 1999). Vega's second claim is grounded in the First Amendment's protection of academic freedom. *Second Amended Complaint*, ¶ 72. *See Vega v. State Univ. of N.Y. Bd. of Trs.*, 67 F. Supp. 2d at 341. He argues that even if the policy is not void for overbreadth and vagueness, his right to academic freedom independently prevents the college from punishing him for his classroom speech--or, more precisely, for permitting certain speech by his students. These two claims are distinct.

Because the majority opinion finds that the defendants are entitled to qualified immunity with respect to Vega's academic freedom claim and that Vega's conduct is the basis "for which [the defendants] may terminate [Vega] without incurring damages liability," Majority Opinion at 469, it "encounter[s] . . . difficulty in understanding precisely what Vega contends [the overbreadth and vagueness] claim adds to his First Amendment academic freedom claim." Majority Opinion at 468. For the majority, the inquiry ends once the defendants have shown that they are entitled to qualified immunity for their actions with respect to one claim. It does not matter to the majority whether Vega was fired because the defendants thought his conduct "exceeded the proper

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[16] The defendants' shifting claim that Vega was not discharged pursuant to the policy but because of other concerns is irrelevant for purposes of this appeal. If Vega was discharged on account of the policy--which is part of Vega's complaint, *see Second Amended Complaint*, ¶ 59, 60--then he can challenge the discharge on grounds of overbreadth and vagueness as well as academic freedom. If at trial it were proved that he had not been discharged because of the policy, then he would have to rely solely on his First Amendment right to academic freedom.

bounds of a teacher's classroom conduct" or because they "thought that it violated the College's sexual harassment policy." Majority Opinion at 468-69. In either case, the majority concludes, the defendants could fire Vega because Vega's conduct was not protected by principles of academic freedom rooted in the First Amendment.

The majority is incorrect. Vega claims that he was fired *because* school administrators decided that his actions violated the college's policy on sexual harassment. Thus, a court considering Vega's lawsuit must determine whether that policy violates the First Amendment's prohibition of overbroad and vague speech restrictions. In these circumstances, the majority's entire discussion on "dual motivation" is, in my view, misleading. Majority Opinion at 468-69. Vega has *two independent* First Amendment claims against the college.[17]

Because the college's actions with respect to each of the claims were objectively unreasonable in light of clearly established law, *see Ford v. Moore*, 237 F.3d 156, 162 (2d Cir. 2001), the District Court properly denied the defendants qualified immunity and left open the possibility of a trial to determine issues of fact.

II

It has long been clearly established law that overbroad and vague policies restricting speech on state university campuses violate the First Amendment. *Keyishian v. Bd. of*

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[17] There is no doubt that the defendants, persons acting in their official capacity as state college administrators, are part of a university system (the State University of New York) that is a state-actor for purposes of this litigation and subject to the First Amendment. *See Dube v. State University of New York*, 900 F.2d 587, 594 (2d Cir. 1990).

Regents of the Univ. of the State of N.Y., 385 U.S. 589, 604, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *see also UMW Post, Inc. v. Bd. of Regents of the Univ. of Wisc. Sys.*, 774 F. Supp. 1163, 1178-1181 (E.D.Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 861-867 (E. D. Mich. 1989). In *Keyishian*, a law prohibited the employment in a university of anyone who "by word of mouth or writing willfully and deliberately advocates, advises or teaches the doctrine of forceful overthrow of the government." *Keyishian*, 385 U.S. at 599, 87 S.Ct. 675. The Supreme Court found the law unconstitutional because it was "wholly lacking in terms susceptible of objective measurement" and had "the quality of extraordinary ambiguity" such that "[m]en of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* at 604, 87 S.Ct. 675.

Vega claims, and the defendants do not dispute, that he was fired pursuant to the college's policy on sexual harassment, which Vega argues is as overbroad and vague as the restriction in *Keyishian*. *Second Amended Complaint*, ¶ 68. *See Vega v. State Univ. of N.Y. Bd. of Trs.*, 67 F. Supp. 2d 324, 341-342 (S.D.N.Y. 1999). To determine whether a particular policy is overbroad in violation of the First Amendment, we must first decide whether it "reaches a substantial amount of constitutionally protected conduct," *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982), or protected speech "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); *see United States v. Rahman*, 189 F.3d 88, 115 (2d Cir. 1999).

The college's policy on sexual harassment at issue here was presented in the January 1994 edition of the SUNY Maritime

College Employee Handbook (eight months before Vega was fired). It is rather brief. Here is the full text of that policy:

> EVERY EMPLOYEE is entitled to a work environment free from any form of discrimination on the basis of race, creed, color, religion, national origin or sex. Sexual harassment is one form of sex discrimination.
>
> Sexual harassment is any unwanted verbal or physical sexual advance, *sexually explicit derogatory statements, or sexually discriminatory remarks made by someone in the workplace,* which is offensive or objectionable to the recipient or which causes the recipient discomfort or humiliation, or which interferes with the recipient's job performance.
>
> It may include:
>
> -- verbal harassment or abuse
> -- subtle pressure for sexual activities
> -- unnecessary touching, patting, or pinching
> -- leering at a person's body
> -- constant brushing against a person's body
> -- demanding sexual favors accompanied by implied or overt threats concerning one's job, performance evaluation, promotion, etc.
> -- physical assault
>
> Any employee who believes he or she has been sexually harassed should contact:
>
> 1. The immediate department supervisor
> 2. The Director of Personnel

(emphasis added). *See also* Majority Opinion at 469 n.10. There is no reference to the possible consequences of a violation; to the person who has direct authority to apply the policy; or to the procedures by which any complaint might be resolved or decided.

By defining "sexual harassment" to include, in part, "sexually explicit derogatory statements" or "sexually discriminatory remarks," this sweeping policy forbids a broad class of protected speech. Even limiting "harassment" to speech or conduct which is "offensive or objectionable to the recipient," or causes the recipient to feel "discomfort or humiliation," is inherently vague, dependent for its meaning on the unpredictable and varying sensibilities of different persons. Such a definition inevitably outlaws a substantial amount of protected speech. It is clear that "under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969). The college's policy proscribes speech based upon the listener's subjective feeling of offense, and could thus render as prohibited harassment, in the view of an especially sensitive listener, nearly all speech related to sex. A straightforward application of the policy would allow, for example, the college to punish a student or professor who, in a classroom discussion on the roles of women and men in the military, makes broad generalized statements about the sexes that someone in the class finds discomforting or "offensive." This silencing of discussion is especially troubling when it involves teachers in a university setting because when we "impose [a] straight jacket upon the intellectual leaders in our colleges and universities[, we] imperil the future of our Nation." *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957) (plurality opinion).

A statute, regulation, or policy is impermissibly vague when it does not allow a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *see Marchi v. Board of Cooperative Educ. Servs. of Albany*, 173 F.3d 469, 480 (2d Cir.), *cert. denied*, 528 U.S. 869, 120 S.Ct. 169, 145 L.Ed.2d 143 (1999). Whenever a "vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms." *Grayned*, 408 U.S. at 109, 92 S.Ct. 2294 (alterations and internal quotation marks and citations omitted). The college's policy is impermissibly vague on its face. Even if one interprets the policy to avoid reaching sexually discriminatory remarks protected under the First Amendment so as to avoid overbreadth, the terms of the policy do not indicate or warn where the boundary between permissible and impermissible speech might be. Limiting "sexually discriminatory" or "sexually derogatory" remarks to those perceived as "offensive," "humiliat[ing]," "objectionable," or "discom-fort[ing]" by another person does not provide any objective definition as to what such remarks might be and who, as a final matter, is to define them. Unavoidably, faculty and students alike are left to "guess at [the policy's] meaning and differ as to its application." *Keyishian*, 385 U.S. at 604, 87 S.Ct. 675.

Indeed, it is unclear whether a complaint must be lodged in order to activate the policy, or whether, as in this case, sanctions can be exacted by the administration on its own initiative without any complaint at all. "A vague law impermissibly delegates basic policy matters . . . for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108-109, 92 S.Ct. 2294. The college's policy states that sexual harassment grievances may

be filed by employees; however, it does not state whether, pursuant to the policy, the college may fire summarily a faculty member without being "afforded opportunity for some kind of a hearing." *Bd. of Regents v. Roth*, 408 U.S. 564, 570 n.7, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

Because the law prohibiting overbroad and vague policies that restrict speech in a classroom was clearly established at the time of Vega's discharge, and the college policy on sexual harassment was by its terms both overbroad and vague, I would conclude that it was not objectively reasonable for the college to fire Vega pursuant to that policy. Any reasonably competent and well-informed college official, in so much as setting eyes on such a policy, could have recognized that the policy's terms were so sweeping--startlingly sweeping in a context where, unlike a business or industrial setting, hierarchies are blurred and teachers perform their duties under the most general directions and virtually no supervision--that it would have violated not only Vega's First Amendment rights, but also the college's own policies on academic freedom.

The college's policy on academic freedom provides in relevant part that "faculty members may, without limitation, discuss their own subject in the classroom; they may not, however, claim as their right the privilege of discussing in their classroom controversial matter which has no relation to their subject." This college policy substantially tracks the language of the 1940 Statement of Principles on Academic Freedom and Tenure by the American Association of University Professors (AAUP), ACADEMIC FREEDOM AND TENURE 33 (Louis Joughin ed., 1969), an organization founded to promote and protect academic freedom in higher education.[18] *See* WALTER P. METZGER, ACADEMIC FREEDOM

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[18] The 1940 Statement, in relevant part, provides

IN THE AGE OF THE UNIVERSITY 194 (6th prtg. 1969) (Metzger, the preeminent student of the history of academic freedom in the United States, observes: "To examine the activities and achievements of the AAUP since its establishment is to view the main outlines of the problems of academic freedom in the twentieth century."). The AAUP's 1940 Statement of Principles on Academic Freedom and Tenure has been relied upon as persuasive authority by courts to shed light on, and to resolve, a wide range of cases related to academic freedom and tenure. *See, e.g., Mayberry v. Dees*, 663 F.2d 502, 513 (4th Cir. 1981) (quoting from an AAUP report deemed "an authoritative source" on tenure, "[T]he [Association of American Colleges] and the AAUP were the framers of the 1940 Statement of Principles on Academic Freedom and Tenure, the fundamental document on the subject."); *Jimenez v. Almodovar*, 650 F.2d 363, 368 (1st Cir. 1981) ("American court decisions [on tenure] are consistent with the 1940 Statement of Principles on Academic Freedom and Tenure widely adopted by institutions of higher education and professional organizations of faculty members."); *Browzin v. Catholic Univ. of Am.*, 527 F.2d 843, 848 & n.8 (D.C. Cir. 1975) ("[The 1940 Statement] represent[s] widely shared norms within the academic community, having achieved acceptance by organizations which represent teachers as well as organizations which represent college administrators and governing boards."); *see generally Gray v. Bd. of Higher Educ., City of New York*, 692 F.2d 901, 907 (2d Cir. 1982) ("Certain

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(b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject.

See 1940 Statement of Principles in ACADEMIC FREEDOM AND TENURE, Academic Freedom and Tenure 36 (Louis Joughin ed., 1969).

AAUP policy statements have assisted the courts in the past in resolving a wide range of educational controversies, such as off-campus speech by professors."); *Adamian v. Jacobsen*, 523 F.2d 929, 934 (9th Cir. 1975). Since it was the students who uttered the sexually-explicit terms during a concededly legitimate ten-minute writing exercise in the classroom in 1994, no college administrator in 1994 reasonably could have concluded that *Vega's actions* violated the college's policy on sexual harassment or fell outside the protection of the policy on academic freedom. *See Wilson v. Layne*, 526 U.S. 603, 614, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) (government officials are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.") (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).

The majority's reliance upon *diLeo v. Greenfield*, 541 F.2d 949 (2d Cir. 1976), Majority Opinion at 469, to support the conclusion that the defendants' actions were objectively reasonable given the state of the law at the time Vega was fired, is misplaced. In that case, we upheld a state statute allowing the discharge of a junior high school teacher "for other due and sufficient cause" and declined to find that the statute was unconstitutionally vague or overbroad.[19] *diLeo*,

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[19] The statute at issue in *diLeo*, CONN. GEN. STAT. § 10-151(b), provided, in relevant part, that a tenured teacher could only be fired after a hearing in which the Board of Education had to prove that the teacher had demonstrated:

> (1) inefficiency or incompetence;
>
> (2) insubordination against reasonable rules of the board of education;
>
> (3) moral misconduct;

541 F.2d at 954. We held in *diLeo* that the teacher "had engaged in a persistent pattern of neglecting his professional duties and harassing and humiliating students." *Id.* at 953. We reached this conclusion after observing that the teacher had met with, and been cautioned by, school administrators for his behavior several times before and that he reasonably knew that the behavior was the cause for the discharge. *Id.* Moreover, we limited the challenged provisions of the statute by construing its vague terms in light of the teaching-specific restrictions in the remainder of the statute and by concluding that "other due and sufficient cause" was limited only to conduct relating to a teacher's professional duties. *Id.* at 954-55.

Indeed, on its facts, *diLeo*, a case decided more than two decades before the episode at issue here, should have alerted the defendants in Vega's case that its actions were likely to violate Vega's First Amendment rights. Unlike in *diLeo*, the college administrators here did not meet with Vega or caution him prior to firing him. Furthermore, the vague and overbroad college policy on sexual harassment at issue here is not susceptible to a limiting construction, as was the statute in *diLeo*, because there are no other specific terms to constrain the policy's broad restrictions. The college policy on sexual harassment did not in its own terms limit its sweep to conduct outside the protection of the First Amendment.

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(4) disability, as shown by competent medical evidence;

(5) elimination of the position to which the teacher was appointed, if no other position exists to which he may be appointed if qualified; or

(6) other due and sufficient cause

The majority also relies on the decision of a panel of the Ninth Circuit in *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996), for the notion that a court in 2001 can conclude that it was reasonable for school officials, in 1994, not to know that this policy on sexual harassment applied to a faculty member's classroom work might violate the First Amendment. Majority Opinion at 469. *See Cohen*, 92 F.3d at 971 ("Neither the Supreme Court nor [the Ninth Circuit] has determined what scope of First Amendment protection is to be given a public college professor's classroom speech"). I disagree. Although in determining whether a defendant is entitled to qualified immunity this Court must carefully define the scope of the right assertedly violated so that it would be "sufficiently clear that a reasonable official would understand that what he is doing violates that right," *Shechter v. Comptroller of the City of New York*, 79 F.3d 265, 270-271 (2d Cir. 1996), it has never been required that the right be defined so narrowly as to require precedent that is "on all fours" with the case at hand. *Jeffries v. Harleston*, 21 F.3d 1238, 1248 (2d Cir.), *vacated on other grounds*, 513 U.S. 996, 115 S.Ct. 502, 130 L.Ed.2d 411 (1994). Vague and overbroad speech codes in an academic setting, whether they seek to restrict ideas related to political affiliation, as in *Keyishian*, or speech related to sex, have long been understood to run afoul of the First Amendment. *See UWM Post, Inc. v. Bd. of Regents of the Univ. of Wisc. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E. D. Mich. 1989). The defendants failed to realize that their sexual harassment policy was vague and overbroad because of their own inadequate training and judgment, not because the law on the subject was unclear.

On the facts presented by this plaintiff, the defendants' decision to fire the plaintiff based on a vague and overbroad policy on sexual harassment was not objectively reasonable.

Accordingly, the defendants were not entitled to qualified immunity on plaintiff's First Amendment claim of vagueness and overbreadth.

III

By 1990, this Court had "clearly established" that state universities and their administrators were not entitled to qualified immunity when they sanctioned a college professor "based on the content of his *classroom* discourse." *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 598 (2d Cir. 1990) (emphasis added). Such sanctions would violate "long-standing and clearly established First Amendment law." *Id.* at 597. In *Dube*, a professor was denied tenure because university defendants disagreed with the views of his course, entitled "The Politics of Race," which referred to Nazism, South African apartheid, and Zionism as forms of racism. The course spurred controversy on and off the campus. We concluded that retaliation against Dube based on his course teaching was "as a matter of law, objectively *un* reasonable." *Id.* at 598 (emphasis in original). Relying upon principles articulated by the Supreme Court, we held that "it has been clearly established that the First Amendment tolerates neither laws nor other means of coercion . . . 'that cast a pall of orthodoxy' over the free exchange of ideas in the classroom." *Id.* at 598 (citing *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967)).

The majority dismisses *Dube* on the ground that Vega's "toleration" of the students' "shouted vulgarities" was "far removed from Dube's expression of his political views." Majority Opinion at 467. In *Dube*, however, we did not condition First Amendment protection of academic freedom on the requirement that the speech in question itself be

"political" in nature. Nor has the Supreme Court held that the protections of the First Amendment are limited solely to political speech. *See Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) ("All ideas having even the slightest redeeming social importance--unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion--have the full protection of the guaranties"); *Universal City Studios, Inc. v. Corley*, No. 00-9185, 2001 WL 1505495, at *11 (2d Cir. Nov. 28, 2001) (Newman, J.); *cf. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (prescription drug price information is "speech"). The majority concedes that Vega's discussion in class was "initiated for legitimate pedagogical purposes." Majority Opinion at 467. If the discussion was begun legitimately, then it cannot become illegitimate solely because it reaches content of which college administrators disapprove.[20] *See Mahoney v. Hankin*, 593 F. Supp. 1171, 1174 (S.D.N.Y. 1984) (political science professor stated a claim based on academic freedom when college attempted to restrict speech on "'current controversial college matters' which were curriculum-related."); *see also Kingsville Indep. Sch. Dist. v. Cooper*, 611 F.2d 1109, 1111 (5th Cir. 1980) (high school teacher's discussions of slavery and post-Civil War Reconstruction protected by First Amendment despite school administrator's order that "nothing controversial should be discussed in the classroom"); *cf. Martin v. Parrish*, 805 F.2d 583, 584 n.2 (5th Cir. 1986) (denying professor's claim based on academic freedom and holding that professor's in-class

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[20] The defendants' action also seems to violate the college's own academic freedom policy, which guarantees to all faculty that they "may, without limitation, discuss their own subject in the classroom," as well as the AAUP's 1940 Statement of Principles on Academic Freedom and Tenure. *See ante* at 475.

condemnation of students' attitude as "bullshit" was "not germane to the subject matter in his class and had no educational function"). To allow administrators the authority to censor the academic content of a class is to allow "a pall of orthodoxy" to enter into the classroom.[21] *Keyishian*, 385 U.S. at 603, 87 S.Ct. 675.

The majority finds support for its decision in the fact that, in this case, students were "yelling" and two were "on chairs." Majority Opinion at 468. Let us be clear: It was neither the volume nor the enthusiasm of the students that prompted Vega's dismissal, but rather, in the words of Howard L. English, Jr., the Vice President of Academic Affairs who fired Vega, "[i]t was the *subject matter* and the words [in the classroom] that were elicited" (emphasis added). *Deposition*

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[21] The fact that Vega is an untenured teacher does not affect the scope of the First Amendment's protection of academic freedom in the classroom. *See Perry v. Sindermann*, 408 U.S. 593, 597-598, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (concluding that "respondent's lack of a contractual or tenure 'right' to re-employment . . . is immaterial to his free speech claim. Indeed, twice before, this Court has specifically held that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights" and citing *Shelton v. Tucker*, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960) and *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967)). In *Dube*, we denied qualified immunity to university defendants based on their objectively unreasonable action against *Dube* without regard to the fact that Dube himself was an untenured college teacher. *Dube*, 900 F.2d at 599; *see also Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993) (nontenured teacher). It is true, of course, that tenure is an important means of securing academic freedom for college teachers. *See* Howard Mumford Jones, *The American Concept of Academic Freedom, in* ACADEMIC FREEDOM AND TENURE 231 (Louis Joughin ed., 1969) ("Tenure . . . is the bulwark of academic freedom"). The importance, however, of tenure to the academic profession's goal of securing protection for academic speech does not suggest or support the proposition that the First Amendment protects only those with tenure.

of Howard L. English, Jr., April 20, 2000, at 267. It is precisely this admitted censoring of the subject matter of a class discussion that violated Vega's clearly-established First Amendment right to academic freedom.

This right surely has its bounds, but, on the facts before us, Vega did not exceed them. We have held that a school teacher's academic freedom in the classroom is limited to actions that are "reasonably related to legitimate pedagogical concerns." *Silano v. Sag Harbor Bd. of Educ.*, 42 F.3d 719, 723 (2d Cir. 1994) (quoting *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 273, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988)). Whether a teacher's action is "reasonably related to legitimate pedagogical concerns" depends in part upon (1) "the age and sophistication of the students," (2) "the relationship between teaching method and valid educational objective," and (3) "the context and manner of the presentation." *Id. See also Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993); *Mailloux v. Kiley*, 448 F.2d 1242 (1st Cir. 1971) (per curiam); *Silva v. Univ. of N.H.*, 888 F. Supp. 293 (D.N.H. 1994). Applying these principles in *Silano*, we found no protection under the First Amendment for a high school teacher who showed a picture of two topless women to a mathematics class to illustrate a lesson on the phenomenon of "persistence of vision." *Silano*, 42 F.3d at 724.

Applying the same three principles in Vega's case should lead to the conclusion that his activity *is* protected. First, Vega was teaching a class to students who were of college-age maturity, and "we cannot think [that the sexually-explicit terms were] unknown to many students," *Keefe v. Geanakos*, 418 F.2d 359, 361 (1st Cir. 1969) (holding that a high school English teacher's discussion of the etymological origins of the word "motherfucker" was protected by First Amendment right to academic freedom). Indeed, it was *the students*

themselves, not Vega, who offered the sexually-explicit terms for consideration.

Second, there is no dispute in this case as to whether Vega's pedagogical method was "legitimate" within the meaning of the case law; the majority concedes that the "clustering" technique used by Vega in the classroom at issue here was "initiated for legitimate pedagogical purposes."[22] Majority Opinion at 467.

Third, the context and manner of the writing exercise show that Vega did nothing to forfeit the protection of the First Amendment. In this case, the clustering exercise occurred during the last ten minutes of a single one-hour-and-ten-minute class. Vega allowed the students to choose the subject matter for "brainstorming." When the students chose the subject of sex, Vega expanded and tempered it to "sex and relationships." Students began the exercise by calling out non-sexually-explicit terms such as "marriage" and "children," and Vega wrote these on the blackboard. A small number of students then called out sexually-explicit terms. Vega neither encouraged nor actively participated in suggesting those terms. Although he did not immediately end the exercise once students began to use vulgarities, he abbreviated a number of these sexually-explicit terms when writing them on the blackboard. Other sexually-explicit

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[22] The controversial teaching technique of "clustering" is essentially a "brainstorming" writing exercise in which students choose a writing subject, select words or concepts that relate to that subject, and use these words to frame a topic. *Deposition of Edward Vega*, May 16, 2000, at 58-59. The teacher who leads this exercise refines the answers the students provide as the exercise continues. Reply Affidavit of *Ian S. MacNiven*, at ¶¶ 4, 5. This pedagogical technique has no appeal to me, and it may have little appeal to others, but for purposes of this lawsuit it has been conceded to be "legitimate."

terms he simply did not write. The parties agree that at the end of the exercise he counseled the students against using such terms and expressed disapproval. No student, before, during, or after the exercise, complained. The defendants do not dispute these facts. *Defendants Reply Brief* at 22 ("[T]he State Defendants have taken as true Vega's version of events for purposes of this appeal.").

In sum, the simple fact that sexually-explicit terms were used by students in a ten-minute classroom exercise is not sufficient to show that Vega exceeded the clearly-established bounds of academic freedom protected by the First Amendment.

Considering all of these factors, and taking plaintiff's version of the facts as we are required to do at this stage of the case, *see Salim v. Proulx*, 93 F.3d 86, 90 (2d Cir. 1996), it was objectively unreasonable for the defendants to fire Vega based on the ten-minute clustering exercise. A college teacher's First Amendment right to academic freedom in the classroom was clearly established at the time of Vega's dismissal, and Vega's actions were clearly within the scope of that right.

Accordingly, the defendants are not entitled to qualified immunity on Vega's claim that he was fired in violation of the First Amendment.

* * * * * * *

In sum, because the law with respect to plaintiff's claims based on infringement of academic freedom and on the unconstitutionally vague and overbroad policy on sexual harassment was clearly established as of 1994, when Vega was fired summarily by college administrators, and because, based on plaintiff's version of the facts, the defendants'

actions were objectively unreasonable, I dissent from the reversal of the District Court's order denying qualified immunity to the defendants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD VEGA,

Plaintiff,

97 Civ. 5767 (DLC)

v.

THE STATE UNIVERSITY OF NEW YORK BOARD OF TRUSTEES, et al., etc.,

Defendants.

New York, N.Y.
September 7, 2000
11:00 a.m.

Before:

HON. DENISE L. COTE,

District Judge

APPEARANCES

PAUL, WEISS, RIFKIND, WHARTON & GARRISON,
Attorneys for Plaintiff,
JULIA L. TARVER,
LAURA A. MENNINGER,
of Counsel.

ELIOT SPITZER, Attorney General, State of New York,
Attorney for Defendants,
ARLENE R. SMOLER,
LYNETTE M. PHILLIPS,
of Counsel.

(Case called)

THE COURT: Plaintiff, are you ready to proceed?

MS. TARVER: Yes, we are, your Honor.

THE COURT: Defendant, are you ready to proceed?

MS. SMOLER: Yes.

THE COURT: Good morning to all of you. We are here for oral argument on the pending motion to deal with the remaining claims in this case, and I am prepared to hear from counsel.

Since this is the defendants' motion, why don't we start with the defendants, and then I will hear a response from Mr. Vega's counsel.

MS. SMOLER: Your Honor, I hope you will excuse me if I don't stand up. I will be referring to all of these documents.

I thought I would discuss each one of the claims in turn. First is an alleged claim based on the violation of the sexual harassment policy of the SUNY Maritime College, and we believe that claim should be dismissed in part because the plaintiff was never charged with violating the sexual harassment policy, and in fact Justice Wilk found that very fact, that he had not been charged, and his decision of the July 15, 1996 expressly states defendants did not charge plaintiff with sexual harassment.

But let's assume for the moment that they did. The fact of the matter is that the law was very unclear at the time of the discharge on August -- the discharge was August 17, 1994. At that time, there was no prevailing Supreme Court

authority or appellate authority that had ever held that a college speech code was unconstitutional.

In fact, two years later, in 1996 the Ninth Circuit ruled that a speech code was unconstitutional because it did not provide specific notice as to what would constitute sexual harassment behavior, but they declined to find the individual defendants liable holding that qualified immunity existed because in 1996, two years after the actions of the defendants in this case, the law was still unclear.

I also would just like to point out this claim only applied to two individuals involved in the decision to dismiss the plaintiff. That would be Admiral Miller and Dr. English. The other three defendants have nothing to do with this particular claim.

To move on to the liberty interest and reputation claim, you have already addressed this claim in part in your earlier April 12, 2000 decision in this case in which you noted that there had to be a contemporaneous connection between the discharge of employment and the challenged statements that are allegedly made about the plaintiff. There is no contemporaneous statement that was made at the time which serves as the basis for this First Amendment claim. All of the statements were either made before he was discharged or they were made several weeks after he was discharged. So let's try and pin down the date of the discharge.

There is no doubt there was a meeting that was held on August 17, 1994 with the plaintiff and Dr. English, who was the head of the -- he was the vice president for academic affairs, the dean of academic affairs in essence.

There was also attending that meeting the defendant Peter Cooney, who was the director of admissions.

Mr. Cooney said nothing during this entire meeting. He was merely there to be a witness, and that I believe is uncontested.

At this meeting the plaintiff was asked, he was shown the notes, Exhibit 25, that were taken by the resident adviser from the blackboard. This resident adviser, Cadet Manino, said that -- has testified that these were his notes, and he told Captain DeSimone, one of the defendants, these were his verbatim notes that he took down of what was said and what was put on the blackboard.

The question of whether or not the notes were accurate is different from the question of what did he tell the defendants. There is no dispute that Manino told Captain DeSimone these were verbatim notes. During the August 17 meeting, the plaintiff was shown the notes by Dr. English, and there is a great dispute over exactly what was said during this conversation, but there is no dispute that the defendant admitted that all of the words that were in these notes had in fact been spoken by students in his class.

There is a question did he write them all on the blackboard, did he write out the full word, did he use initials? That is in dispute, we concede, but the material fact is he has admitted that, yes, all of the words in these notes were said and shouted out by students in his class, had allowed this to go on.

After he confirms this, Dr. English is expecting an explanation. He thought that the student's notes must be wrong, no professor obviously would allow this to go on in class.

After that happened, and he was advised that, yes, in fact the plaintiff did allow this to happen, he informed the plaintiff that he was -- his contract would not be renewed.

Admiral Miller, who was the chief executive officer of the college, meets with him shortly after that and says, yes, that's fine, I agree, he should be discharged, and in fact Admiral Miller had authorized him to discharge the plaintiff if in fact the incidents were as they appeared to be, if in fact the notes were an accurate depiction of what went on in that classroom.

So the time of the discharge is August 17, 1994. There is no statement that can form a liberty interest claim. Plaintiff is relying on a memo to file that Dr. English wrote. Now, Dr. English has testified that this memorandum to file was never -- which is a fairly innocuous memorandum, but he's testified that the memorandum was never put in the plaintiff's personnel file, it was never shown to any prospective employer; and in fact the plaintiff is unable to identify anyone who ever saw this memorandum to file. No prospective employer had seen it. Only the secretary who typed it had seen it and Dr. English had seen it.

In their opposition papers, plaintiff says that, well, in fact in the state court action the Assistant Attorney General at the time said that this had at one point been in the plaintiff's personnel file but it was removed.

Now, I have checked with the college and I have been advised that is simply not so, and I have not been able to consult with that Assistant Attorney General, but in any event she would have no knowledge. She was an employee of the Attorney General's office. She was not a employee of the college, and that is hearsay, whatever she was told. That would have been hearsay information.

The people with the relevant admissible knowledge, Dr. English, know that this document was never placed in his personnel file and the plaintiff admits that he can't say that anyone ever saw it. There are challenges to statements made about the plaintiff and about his conduct several weeks after the discharge.

THE COURT: Why is that hearsay? Why isn't it an admission of a party opponent?

MS. SMOLER: It's hearsay --

THE COURT: The AAG, the Assistant Attorney General speaking is the agent for the defendant.

MS. SMOLER: Yes but that statement was never, as far as we can tell, was never made. There is no record in a court hearing. I tried to see if there was a record of that court hearing. There is nobody in our office and no one in the people at the college who have been able to verify that story, and I have no information that that is at all accurate.

THE COURT: Well, counsel that is a different issue. That is a factual issue as to whether the statement was made or not. My question to you was, why is it hearsay?

MS. SMOLER: Because the plaintiff's counsel would have no knowledge of whether or not it was in the file. Everything she got came from the file came from the college itself. She wasn't there at the time. She supposedly had said this was at one point in the file and it had subsequently been removed from the file. It no longer exists. This was before Justice Wilk in 1996, but she never had any personal knowledge of that being in the file. She was relying supposedly, if in fact she was relying, if she made the

statement, she was relying on information she supposedly *would have* received from individuals at the college.

I will concede if she made the statement, which we dispute, she would not have personal knowledge, but that she would have made the statement acting in her capacity as an agent of the defendants. But in any event there is no record that that had ever occurred, and there is only the plaintiff's testimony.

None of the other statements that were attributed to the defendants were made contemporaneous with his discharge, and so therefore, they do not give rise -- they might give rise to a state defamation claim, they do not give rise to a 1983 claim for violation of liberty interest and reputation.

Finally, on this point, there is no doubt that it's the plaintiff who widely publicized the accusations that were supposedly made against him. He gave an interview in March of 1995 to the City Sun. That interview, the article result of that interview is attached as Exhibit 21.

There is no doubt that he mailed a copy of that interview to between 100 and 150 people. He also mailed a copy of his February 1995 state court complaint which contained these allegations to every student who he had ever taught at SUNY Maritime, every member of the SUNY Maritime faculty, staff, and administration listed in the catalog, and every member of the SUNY board of trustees. He published this statement.

THE COURT: Counsel that certainly may affect damages, but how does it affect the viability of the cause of action?

MS. SMOLER: Because he did -- and there was no publication that what he know of this statement.

THE COURT: I am assuming --

MS. SMOLER: There is no evidence in the record there was publication of the statement, and to the extent that it has become known, that other people had heard about it, it's because of his actions. I am certain if the plaintiff's counsel wishes to explain what they believe to be a valid cause of action, I will be happy to address that in response.

THE COURT: No, I think we don't need another layer of argument here.

MS. SMOLER: The 1983 academic freedom claim, this is probably the most interesting claim. Plaintiff was admittedly discharged. He was also without doubt an at-will employee under the law of the State of New York. Under the terms of his employment contract, under the provisions of the SUNY policy statement, there is no question he could be fired for any reason or for no reason.

Obviously, he cannot be fired for violation of his constitutional rights but the question is, was it reasonable to believe, were his rights violated and was it reasonable to believe that the defendants would have known they were violating it? They know that Admiral Miller, as the chief executive officer, had the absolute authority to hire and fire people. If he was a tenured professor, we concede there would be a completely I different case if he were a tenured professor. They have an obligation as --

THE COURT: You are not suggesting there is a different First Amendment standard based on whether you are tenured or not?

MS. SMOLER: No, but I believe there is a balancing test for First Amendment academic freedom, and the balancing, it changes based on whether or not the professor is tenured or not. The free speech rights unquestionably of a tenured professor are much greater than the free speech rights of an at-will employee, and the question, was the conduct of the Admiral reasonable in firing him, it becomes more reasonable, and also reasonable in light of the fact that he was an at-will employee. I am not sure it would have been reasonable for them to fire him if he was a tenured professor.

I don't particularly want to repeat for the record the precise words the students were allowed to shout out. I will, if anyone is interested, but I don't think it's unreasonable in any way for an administrator to conclude that it was completely inappropriate for a professor to have allowed a student to shout these words out.

I am not hedging about whether it was outrageous for him to write it down on the blackboard, forget about that, let's just talk about allowing the course to go on in which he allowed students to shout out these words. At least 10 of the students in this class were under 18 years of age, and that is verified by Exhibit 20. There is at least one and possibly two women out of the 40 or so in the class.

The Supreme Court is clear in Hazelwood that educators may limit the content of school-sponsored speech so long as the limitations are reasonably related to pedagogical concerns, and so I suppose there may be a discussion as to was his conduct reasonably related to pedagogical concerns, and I have argued that those pedagogical concerns that would not justify allowing students to engage in this behavior.

There were other ways to teach this course. This was a military college where pre-college students were learning writing. This was not a course in popular culture or in sociology or sex education, and it's a military college, it's not a liberal arts college.

These are 17-year-old students. They are two years older than the students in the Silano case in the Second Circuit, 42 F.3d 719. In this case the teacher wanted to show a film with bare-breasted women to a tenth-grade class. These are two years older, and it is much more serious than a photo of the human body.

In addition, some of those students were foreign-born, English was their second language, and it's not clear they would have even understood what this language was and how it was so inappropriate in virtually any setting.

Also, it's important to remember that the university also has First Amendment rights, and we have to balance the university's rights against the individual rights.

Again, when it's a tenured professor, that balance shifts somewhat, but when it's an at-will employee, I think the university's interests have to be given very serious consideration.

Justice Frankfurter over 40 years ago talked about the four essential freedoms of the university, to determine for itself on academic grounds who may teach and what may be taught. Certainly, it was appropriate for the university to be concerned about what was being taught and what actions were being taken in one of their classrooms.

THE COURT: Isn't that balancing test that is done by a jury as opposed to a court when there is a disputed issue of fact?

MS. SMOLER: I don't believe there are any material disputed issues of fact. We know that these notes were taken in the class, we know that the plaintiff had admitted that he allowed all of these words to be shouted out in his class. I believe Justice -- one of the plaintiff's favorite poets is John Keats, and it's like this is all ye know and all ye need to know, to paraphrase Keats.

This is all you need to know to say that this conduct did not violate a constitutional right of his under these factual circumstances. The purpose obviously of the qualified immunity defense is to spare government employees a trial in the event that the claims are not justified. I don't see that the claim is justified sufficient to go to trial. Those facts alone are enough to know that their conduct was not unreasonable, did not violate his constitutional rights.

THE COURT: Thank you, counsel. I will hear from counsel for Mr. Vega.

MS. TARVER: Thank you, your Honor. Your Honor, I believe as you might have just indicated in your last question to opposing counsel, this is a case that is absolutely teeming with disputed questions of material fact, right down to the very reason our client, Professor Vega, was terminated, what took place in the classroom in discussion.

The fact that counsel thinks that the notes themselves establish what took place in the classroom is totally incorrect. First of all, as we have mentioned in our papers, there is a lot of question about the very notes that opposing counsel have submitted as an exhibit in this action. It's clear that a page of

notes, front page and back page of the notes do not represent the entire classroom discussion.

The testimony of the student in the class, Michael Manino, makes abundantly clear that these if anything were only part of the classroom discussion on the day, and there is also some question about the authenticity of that very document to the extent that Mr. Manino remembers its being in a certain type of not book and that type of not book was not in the defendants' possession, as I believe we have made your Honor aware, been lost by the Attorney General's office, and we won't ever know for sure what the notes from that classroom actually were.

But putting aside the actual notes, there is a conflict in the testimony about what took place in the classroom, whether Professor Vega warned the students about the use of those words, whether the words were written on the blackboard, whether they were represented on the blackboard with their initials, whether all the words on that piece of paper were actually said is a material fact in dispute in this litigation.

While it is true that Professor Vega acknowledged that some of those words were spoken, when he said that to Mr. English in the discussion they had the day he was terminated, he said that because he was given about five seconds to look at a piece of paper and he recognized a few the words. That being said, there were plenty of other words that were generated during the classroom discussion.

All of this will be a question that the jury will have to consider in this case when they think about whether it was appropriate to hold a classroom discussion. More important, the question, as your Honor alluded to before, the question of whether this was an appropriate teaching technique for a

college composition course is also a question of fact the jury should determine.

They should hear from persons like Professor MacNiven, the only writing instructor to give any testimony in this case. Professor MacNiven says, and I think rather eloquently, we have cited it in our brief on page 14, he writes: "For better or worse, content and craftsmanship in writing and motivation are linked. Students who appear to be poor writers sometimes write very well when their interest is aroused. Therefore" -- and I am skipping a bit -- "therefore, the good composition teacher directs his or her class toward subjects that excite interest and therefore motivate good effort on the part of student, career choices, politics, sex, and marriage."

That is exactly what took place here, and I think it is really within the province of the jury who will sit here to tell us whether it was appropriate to have that sort of discussion, student-initiated discussion, in a college classroom.

But those are just some of the facts that we have in this case, and I guess I will go briefly through each of the three claims and try to respond to opposing counsel's argument.

First on the vagueness and over-breadth challenge, I guess I am not entirely clear why, in the face of their own affidavits, they try to contend that Professor Vega was not terminated for violating sexual harassment policy. If you look at the Miller affidavit that we cite in our brief, you will see that Miller states quite specifically that Professor Vega was terminated because his behavior was in contravention of the sexual harassment policy.

You will see again that the Gonzalez affirmation, this is, again, Assistant Attorney General Elizabeth Gonzalez, the same person who made the statement or argument before Justice Wilk we were just talking about, those statements in her affirmation that based on his review of the facts Admiral Miller ratified the termination of plaintiff's employment pursuant to the sexual harassment policy of the college.

That they would come today and still maintain in the face of those statements that he was not terminated pursuant to the sexual harassment policy strikes me as very disingenuous.

But even assuming those statements were not enough, we know at the time Professor Vega was terminated he was told that his classroom discussion was sexual harassment. He was told that it exposed the college to liability for sexual harassment.

Both of these facts, even if they tried to make some metaphysical divide between whether his statements were sexually harassing but that is not why we are firing you although we are firing you for the statements you made, they can't divide the line, parse the line so carefully they can fire someone for what they call sexually harassing speech but at the same time not give the protections that are afforded under the school sexual harassment policy. That is totally inappropriate.

And here, counsel in their own brief state that the speech in Professor Vega's classroom would have violated Title 7, so I think all of that establishes quite clearly that Professor Vega was terminated pursuant to the school sexual harassment policy.

So then the question, of course, becomes, is the school sexual harassment policy vague and overbroad? We maintain very strongly that it is.

The sexual harassment policy, which you can read excepted at page 15 of the defendants' moving brief, states, "Sexual harassment is any unwanted verbal or physical sexual advance, sexually explicit derogatory statements, or sexually discriminatory remarks which are offensive or objectionable to the recipient or which causes the recipient discomfort or humiliation."

Very difficult to imagine a policy quite so vague and broad. You are charged with trying to determine what is going to cause the listener to your speech to be offended. Very difficult standard, and I believe that such policies, where they are completely subjective in the minds of the listener have been shot down.

Moreover, the school sexual harassment policy does not have the standards of Meritor or other cases which require that the speech be so pervasive as to alter the condition. So therefore we would maintain both facially and as applied, the school sexual harassment policy must fail.

On the question of qualified immunity, I think this court has already established that this is a clearly established right that, even though it may be true, and I am not sure it's true but even though it may be true, that no school's speech code or sexual harassment policy was stricken down before the time the plaintiff was terminated, it's very clearly vague or overbroad as they relate to policies of this sort wasn't a clearly established right at the time of his termination; and the court was right when she stated at page 30 of the opinion that questions such as these really should not be resolved on a motion submission.

Qualified immunity looking to the reasonableness of the defendants' action should be submitted to the jury, if anything. It is very fact intensive. The jury would have to consider things like no one complained, there were students in the classroom, none of them were offended. I don't believe the defendants contend that any of the students in the class were offended.

I think, again looking toward the reasonableness, another fact the jury will have to consider is why the defendants failed to investigate, why they failed to initiate any proceedings under the school's sexual harassment policy. All those things are very fact-intensive decisions that must be applied by the jury.

Moving on to the academic freedom claim, again, it is a very large question of material fact in this case what actually happened in the classroom, and I have already gone through a lot of that so I won't do that again, but what we do know is that at least in similar cases such as Keefe and Dube, it does matter how old the students are, it does matter what sort of course is involved. In Keefe it was high school seniors, and it was an essay that included many allusions to the word motherfucker, and the First Circuit upheld that right of the teacher to engage in that sort of discussion and that it was appropriate conversation for a composition course, and we know that the Second Circuit has given us very clear guidelines in Silano about the factors we should employ in the academic freedom analysis, and that analysis looks to throw things:

First the age and sophistication of the students. Here we know the age of the students is college age. The defendants admit in their answer that the students in that classroom were of the age to do college work. In other

words, they were adults. They were permitted to go to R-rated movies, they certainly heard these words before. Michael Manino, the student in the class, testified those words weren't heard for the first time that day by those students.

Michael Manino testified this was a campus where as freshmen they were having strippers come in and performing sexual acts in the dormitories. Michael Manino testified that the one woman he recalls seeing in the class had a mouth like a truckdriver herself. These were not students who were hearing things that were shocking their senses, and why do we know that? The students initiated the conversation, the students volunteered the words.

That he would allow them to participate in the discussion, that he would use this as a very legitimate pedagogical device to get them talking, to get the ideas flowing, is totally appropriate. And how do we know it's totally appropriate?

Again, we go back to the MacNiven affidavit which says the students have to select their own topics sometimes in order to excite ideas and to get the discourse flowing. So the ages and sophistication of the students in this case here clearly would indicate that the topic of the classroom discussion was appropriate.

What about the relationship between the method used and the valid education objective? Again, Professor MacNiven's affidavit is all we need. The relationship between the teacher's method, which was clustering or brainstorming, and a valid educational objective, which was to get the students to generate ideas, to get them to learn how to break past rote thinking so they would think in new ways,

and brainstorming was the whole purpose. You can't censor that process.

Also, because if you censor you are narrowing, you are confining. That is what is done at the end of the process, which is what Professor Vega rightly did when he warned the students at the end of the class that these words do alienate readers, those words should be used with caution if at all. So there was a relationship between the method and valid education objective.

And finally, the context and manner of discussion was also completely ratified by Professor MacNiven as well as the faculty resolution. Recall that in this case there is a faculty resolution condemning what was done to Professor Vega. If nothing else, that creates a question of fact about the appropriateness of their conduct in terminating his employment for their behavior. There was an entire faculty-wide vote.

Recall also that the chair of Professor Vega's department, Humanities Department chair, Karen Markoe, was not consulted about his termination and she too believed it was inappropriate.

So I think all of these things create questions of fact at best which should appropriately be put to the jury as to whether these students were of age, of sophistication to engage in this sort of discussion, and whether Professor Vega's instruction was appropriate under the circumstances.

Again, the defendants try to rely on a qualified immunity defense because they know the facts are against them, and they claim that the law of academic freedom was not clearly established.

Again, your Honor, you are alert to what is now the law. At pages 27 to 29 of your previous opinion that academic freedom was clearly established at the time of Professor Vega's termination, but even if that were not enough, again, we know that there was a faculty resolution at the time condemning the termination. That also goes to the factual question of whether their conduct was reasonable in terminating Professor Vega.

We also know that their school's own policy regarding academic freedom would have cautioned them not to fire him as a factual matter if they had read it and followed it. And again their failure to investigate, all of these are factual issues the jury can consider when deciding whether they are entitled to qualified immunity.

Now, on the last round, the liberty interest and reputation, what I usually refer to as the stigma-plus claim, defendants concede, as they really must, that what was said about Professor Vega was stigmatizing. Obviously, there was a loss of employment. So those prongs of the test are clearly met.

And then they go on to try to make again some sort of metaphysical distinction about the temporal link associating some of the defamatory statements and the loss of Professor Vega's employment.

We have to remember Bishop and the precedent which established the stigma-plus claim. All they talk about is whether the defamation occurred in connection with.

That is true, that more recently courts have said there must be a temporal link and that is, of course, true. If something occurs in connection with the termination, the temporal link could be extended out years.

However, I caution the court in engaging in the analysis which defendants urge, which would say that the minute Professor Vega was fired anything said that afternoon, the next day, is already too late because he's been fired, certainly, certainly, Bishop men had to make in connection was broader than 24 hours because, in connection with the termination, does have some reasonable limits of temporality on either side, and even if that were not the case, we certainly have statements before Professor Vega was fired as DeSimone is investigating, as Jones and others are talking about him, as Cooney is involved, as Bizar is involved, we have cited all of this in our brief.

There are discussions amongst the administration of the school about what's happening. Professor Vega is called a danger to the students. People are talking about it. It's said that he is a pornographer, it's said that he is not safe to the freshmen any longer. It's said that he is sexually harassing the students, that the college is going to be exposed, that this is going to be another Tailhook incident.

All of this is taking place within the halls of the administration. You can almost just imagine it. The secretaries know about it, the administrators are talking to each other about it.

Richard Bizar knows about it. He is not involved in the decision. Lots of people who were not directly involved in the decision still know about it such to the point that within nine days by the time the graduation took place, as Karen Marco returns from Europe, she against being the chair of the department, Karen Marco says in her deposition that nine days after Professor Vega's termination it was a "great issue on campus."

The fact that it was nine days later, you have to believe something happened in those intervening nine days, and I am not sure, frankly, where you cut off the temporal link, but I have to believe it can't be five seconds after Professor Vega is fired, particularly when, as here, I think defense counsel has acknowledged it is quite difficult to ascertain when precisely Professor Vega was fired. Was it August 17? Was it August 18?

This dispute is taking place with... a 56.1 statement, so particularly in that context, when the whole issue about when he is fired is unclear, I think it's certainly a question of fact whether there were some defamatory statements made in connection with his termination.

Moving on to the question of whether there was any defamatory statements made at all, opposing counsel has just suggested to you that there was no publication at all. Well, of course there was. Everything I have just said to you, everything we have cited in the brief, were all instances of publication.

But turning specifically to the personnel file, the memorandum that was placed in the personnel file, that is a question of fact. We do have an admission by an agent of the party that that document, the memorandum to file, was actually in Professor Vega's personnel file. I think the jury is entitled to hear that. If we have to go and ask for further testimony on that, we will.

Moreover, the chair of the Humanities Department, Professor Karen Markoe, has also stated there were files in her office that had plenty of information about what happened in Professor Vega's classroom and why he was fired. All of that material was in the file. That was an instance of publication.

That being said, Dr. English, who wrote the memorandum at issue, said himself that he placed it in the file of the vice president of academic affairs where it could be kept, where any successor might come and see it. So there is no doubt that the file was published, the memorandum was published.

His secretary saw it, we know also that the news had traveled so fast, even among secretaries in the administration or however news like that travels.

We know it travels to the point that when Karen Markoe called back from Europe to the house, her husband, who didn't even work at the college knew about it. This is within days of the termination. Her husband knew because the secretary of the Humanities Department called him at home, so that when Karen Markoe called him, that is how she found out. No question these statements were published. No question they were published contemporaneous which his termination.

And even if your Honor feels compelled to limit the time to before his termination, which we would maintain is inappropriate, even if your Honor is compelled to do that, there were statements made before termination even took place, but Professor Vega wasn't even given an opportunity to respond. He was called a pornographer and sexual harasser and a danger to the students, who was creating a liability against the college.

And that, of course, was clearly established at the time and to the extent there are any factual issues in dispute about whether their conduct was reasonable in terminating him for this alone, we think the jury should hear those factual issues at the appropriate time.

THE COURT: Let me see if you can help me pass through your stigma-plus claim. As I understand it, there are really two sub-sets here. One is the statements made in connection the firing, and then there is that second argument you are using the same legal theory that concerns the memo authored by Dr. English that you contend was placed in the personnel file, and your argument there is that by placing it in the personnel file, which you hope to be able to prove at trial, that it could have jeopardized employment opportunities.

Do I understand that those are two separate but parallel arguments?

MS. TARVER: Yes.

THE COURT: Even if you succeeded in proving that Dr. English's memo had once been in the personnel file, but that it no longer is in the personnel file, and hasn't been in the personnel file for a substantial period of time, and that it in fact was never communicated to any other prospective employer as a consequence of it having been removed from the personnel file, do you still have a claim under the second theory?

MS. TARVER: Yes, your Honor, and the reason why is the cases hold that you don't have to wait until the prospective employer actually learns of the defamatory statements in this case, actually comes across the memo in the file or learns about it through a telephone conversation with someone who has it in front of them.

You don't have to wait that long. Its presence in the file is in itself enough to give rise to the stigma-plus claim. The plaintiff knows that any prospective employer who comes to the school looking for help, he knows and in fact

Dr. English testified he would not be prepared to give Professor Vega a recommendation, he knows that would be significant to prospective employers.

So the very presence of the memo in the file has been held to be enough to give rise to a stigma-plus violation.

THE COURT: Right, but I am posing now a slightly different set of facts.

MS. TARVER: I am sorry, that the memo was removed?

THE COURT: Right, and that during the period of time when it was in the file we know that it didn't jeopardize any prospective employment.

MS. TARVER: Again, your Honor, I would have to say those are questions that would have to be resolved by a jury. I don't see how we can ascertain whether it had an effect on Professor Vega's future employment without calling persons to the stand who could testify about that, including Professor Vega.

THE COURT: Well, but this is a summary judgment motion. Right now you have no evidence that during the period it was in the file that it had a impact on his future employment, and you have no evidence that it remains in the file.

MS. TARVER: That is correct. However, I think if it was in the file for a certain period, even if it were in the file and no prospective employer saw it, I still believe its presence in the file, even for six months, and no prospective employer saw it, still gives rise to a significant stigma-plus claim. Whether that goes to damages may be true, I don't

know. That may very well go to damages, but I do believe as a matter of law its presence in the file alone is enough to give rise to a stigma-plus claim. I have nothing further unless your Honor does.

THE COURT: Thank you, counsel.

The court having granted in part and denied in part both defendants' initial motion pursuant to Rule 12(b)(6) and their subsequent motion pursuant to Rule 12(c), the remaining defendants in this case now move for summary judgment on the remaining claims. For the following reasons, that motion is denied. The allegations at issue are set forth in my opinions of September 28, 1999, and April 12, 2000, and I will not repeat them here.

Remaining in this case are claims by Mr. Vega that the termination of his teaching position at SUNY Maritime in August 1994 following his leading a classroom exercise during which students used sexually explicit language violated his First Amendment rights, and that the defendants' defamatory statements regarding the reasons for his discharge violated his Fourteenth Amendment liberty interest in his reputation.

The standard for summary judgment motions is well known and I will not repeat it.

Turning to the first argument, the defendants' claim based on the vagueness of the sexual harassment policy, the defendants argue that summary judgment is appropriate on Vega's claim regarding the policy because Vega was not fired pursuant to the policy. Plaintiff, however, has shown that there is a genuine issue of fact on this point. Defendant Miller submitted an affidavit in Vega's state court action stating, "Mr. Vega subjected his 17- and 18-year-old students

to discomfort and humiliation by creating an intimidating, hostile, and offensive environment in contravention of the sexual harassment policy of Maritime College. He exposed the college to potential liability. For those reasons I ratify this termination."

Miller's deposition testimony also indicates that he ratified Vega's termination with the policy, and potential sexual harassment liability, in mind. This evidence establishes an issue of fact as to whether Vega was terminated under the policy.

Defendants next claim that as a matter of law the policy is not unconstitutionally vague and overbroad. The policy defines sexual harassment as, "any unwanted verbal or physical sexual advance, sexually explicit derogatory statements, or sexually discriminatory remarks made by someone in the workplace, which is offensive or objectionable to the recipient or which causes the recipient discomfort or humiliation or which interferes with the recipient's job performance," and is made applicable to students by an August 10, 1989 memorandum from Maritime's president. Vega's challenge to the policy is both facial and as applied.

Defendants argue that the policy cannot be unconstitutional because it reflects the Supreme Court's holding on hostile environment sexual harassment in Meritor, 477 U.S. 57, although they do not point to specific language or a specific page of that decision. Meritor, however, holds that "for sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." (Id. at 67)

On its face, the policy is much broader. Included within the definition of sexual harassment is certain behavior "which causes the recipient discomfort." There is no requirement that the behavior be "severe or pervasive," Nor is there a requirement that the behavior "create an abusive environment," as is made clear by the use of the disjunctive in the phrase "which causes the recipient discomfort or humiliation or which interferes with the recipient's job performance."

Both the Supreme Court and Second Circuit have reaffirmed the standard in Meritor. See, for example, Harris v. Forklift, 510 U.S. 17 at 22, and Quinn v. Green Tree, 159 F.3d 759, 765. Accordingly, Maritime's policy is not protected by Meritor or by Title 7 jurisprudence,

Vega urges the court to hold the policy unconstitutionally vague or overbroad as a matter of law. Because Vega did not cross move for summary judgment and the defendants have not addressed the case law cited by Vega on this point, I decline to so hold.

Finally, defendants argue that they are entitled to immunity because all the reported cases holding school's sexual harassment policy to be overbroad post-date the events at issue, so that the right at issue was not clearly established at the time of their actions.

Qualified immunity protects state actors sued in their individual capacities from a suit for damages. See Lewis v. Cowen, 165 F.3d 154, 166. A state actor will be qualifiedly immune where his actions did not violate rights that a reasonable person would have known were clearly established. See Stuto v. Fleishman, 165 F.3d 820, 825. A court evaluating a claim of qualified immunity must "first determine whether the plaintiff has alleged the deprivation

of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." Wilson v. Layne, 526 U.S. 603, 609.

Three factors determine whether a right is clearly established: (1) whether the right in question was defined with reasonable specificity; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question and, (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful." Schecter v. Comptroller, 79 F.3d 265, 271.

As early as 1967 the Supreme Court held that the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom," including laws that are impermissible vague or that provide inadequate notice of proscribed conduct. Keyishian v. Board of Regents, 385 U.S. 589, 603. See also Dube v. State University, 900 F.2d 507, 598.

These cases clearly establish Vega's right to be free from enforcement of a Maritime policy that constitutes on its face or as applied a vague or overbroad restriction on classroom speech. The defense of qualified immunity is not available merely by virtue of the absence of a "case on all fours." Jeffries v. Harleston, 21 F3d 1238, 1248.

I recognize that the Ninth Circuit, in holding a college sexual harassment policy unconstitutionally vague found the individual defendants entitled to qualified immunity because "the legal issues raised in this case were not readily discernible." Cohen v. San Bernardino, 92 F.3d 968, 973. Not only is that holding not binding on this court, but it also concerned a policy that was different and narrower from the one at issue here. (Id. at 972).

Let me turn then to the academic freedom issue, another First Amendment claim.

The defendants argue that Vega's classroom behavior was not protected by his right to academic freedom, or that the defendants are entitled to qualified immunity because that right was not clearly established. Defendants cite case law holding that the right to academic freedom is not absolute but is limited by the university's legitimate interest in regulating teaching. See, for example, Regents v. Ewing, 474 U.S. 214, 226 n.5. Defendants do not specifically address the university's authority to restrict classroom speech, however.

The Second Circuit has held that "educators may limit the contents of school-sponsored speech so long as the limitations are reasonably related to legitimate pedagogical concerns." Silano v. Sag Harbor, 42 F.3d, 719 at 722, quoting Hazelwood, 484 U.S. 260, 266-67.

The court stated, "Whether a school official's action is reasonably related to a legitimate pedagogical concern will depend upon, among other things, the age and sophistication of the students, the relationship between the teaching method and valid educational objective, and the context and manner of the presentation." Id. 722-23.

Silano involved the use of a film clip of bare-chested women to demonstrate the "Persistence of vision" to a tenth grade math class. The court held that the use of nudity was entirely unnecessary to illustrate this scientific phenomenon. Id. 723.

Defendants attempt to draw an analogy between that case and the one at hand, and that attempt is unpersuasive. Here, all the students were 17 years of age and high school

graduates. More importantly, Vega has shown that an issue of fact exists as to the relationship between teaching method and Vega's educational objective.

Ian S. MacNiven, a Maritime English professor, submitted an affidavit stating that essential to the "clustering exercise used by Vega is permitting and encouraging students to call out anything suggested by a topic."

Finally, issues of fact exist with respect to the context and manner of the behavior. Vega's deposition testimony shows issues of fact regarding, for example, the length of the discussion of sex and Vega's treatment of sexual explicit terms called out by students, for example, whether he wrote out, abbreviated, or did not write those terms on the blackboard. Thus, summary judgment on Vega's academic freedom claim is inappropriate.

Finally, summary judgment for defendants on the basis of qualified immunity is not appropriate because the legal issues were clearly established by the Supreme Court in Hazelwood prior to the events at another issue here. See my discussion in my prior opinion, 67 F. Supp. 324, 341 and the cases I cite therein.

Let me turn to the Fourteenth Amendment claim, the liberty interest in reputation. Defendants argue that summary judgment is appropriate on Vega's Fourteenth Amendment claim because there is no genuine issue of fact regarding whether the allegedly defamatory statements regarding Vega's classroom behavior were made in the course of Vega's termination, and because the statements were not publicized.

As discussed in my April 12 opinion, mere defamation of an individual is insufficient to invoke the

guarantees of procedural due process absent an accompanying loss of government employment. Paul v. Davis, 424 U.S. 693, 706. See also Saulpaugh v. Monroe Community, 4 F.3d 134, 144 and Gentile v. Wallen, 562 F.2d 193.

Defendants assert that the statements at issue were not made concurrently with Vega's termination, without providing any citations to the record in support of this assertion. Defendants' Rule 56.1 statement is similarly devoid of any references to the date of any alleged defamatory statement. Vega, for his part, cites a number of statements he claims were made on August 16, the month of Vega's termination, but this date is nowhere are to be found in the documents cited. Still, those documents do show that the conversations at issue occurred in the summer of 1994 and are sufficient evidence of defamatory statements contemporaneous with Vega's termination for that issue to be submitted to a jury.

Vega's Fourteenth Amendment claim also concerns a memorandum to file drafted by defendant English and dated August 18, unquestionably concurrent with Vega's termination. Defendants assert that Vega's employment was terminated by English's letter dated August 18 and ratified by defendants' Miller later that month. Accordingly, summary judgment is not appropriate with respect to Vega's Fourteenth Amendment claim on the basis of the timing of the statements at issue.

Finally, the legal standard set forth above was clearly established by August 1994 as demonstrated by the cases I have cited. Accordingly, summary judgment is not appropriate on the basis of qualified immunity.

Defendants' argument that the defendants' defamatory statements were protected by the common interest or opinion privileges, raised for the first time in the reply, is not properly considered here. Instead, I will consider any proposed instructions to the jury on these principles which the parties care to submit.

Turning to the issue of publication, defendants argue that Vega has failed to show an issue of fact with respect to publication. Defendants' citation to deposition testimony by Vega stating that he had not been denied a teaching position by virtue of any statement by the defendant is not dispositive. First, Vega has always asserted that the defamatory statements contributed to his loss of his position at Maritime. Second, Vega need not prove he has actually been denied future employment in order to prevail on his claim. Placing defamatory statements in a personnel file where they are likely to be shown to prospective employers may be sufficient to establish public disclosure. See Brandt v. Board of Cooperative Education Services, 820 F.2d 41, 44-45.

Vega has testified that defendants' then attorney admitted during a state court proceeding that a memorandum written by English regarding the reasons for Vega's termination had been found in the personnel file at one point.

By testifying that teaching opportunities had been closed to him by virtue of defendants' defamatory statements, Vega has raised a genuine issue of fact with respect to this additional claim of damage to his reputation.

Finally, defendants argue that summary judgment is appropriate on all claims in favor of defendants DeSimone, Jones, and Cooney. They raise this however, for the first time in their reply papers and it is not therefore properly

considered by me at this point. Defendants' blanket assertion in the main brief that Vega has failed to establish a prime face case on any of his claims, does not provide notice to Vega of this argument, and defendants' statements, which Vega does not dispute, in their Rule 56.1 statement, that DeSimone, Jones, and Cooney lack any responsibility for hiring and firing faculty, do not establish that those defendants had no involvement in Vega's termination and are entirely irrelevant to Vega's Fourteenth Amendment claim. For these reasons then, summary judgment is denied.

I want to set a schedule then for the course of this case. I don't think we need a court reporter at this point while we discuss scheduling matters. Does anyone wish the court reporter to stay?

MS. TARVER: No, your Honor.

MS. SMOLER: No, but I would like to get a record of the transcript.

THE COURT: Let's go off the record then.

(Discussion off the record)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

DC SDNY
DC Docket: 97-cv-5767
DC Judge: Cote
DC Mag: Pitman

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 8th day of January two thousand one.

EDWARD VEGA,

Plaintiff-Appellee,

v.

THE STATE UNIVERSITY OF NEW YORK BOARD OF TRUSTEES, THE STATE UNIVERSITY OF NEW YORK MARITIME COLLEGE, Faculty Student Association of SUNY Maritime College, Inc., HOPE BECKER, and JOAN API,

Defendants,

FLOYD H. MILLER, JAMES C. DESIMONE, HOWARD L. ENGLISH, CAROLYN D. JONES, and G. PETER COONEY,

Defendants-Appellants.

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dkt#:
00-9214

United States Court of Appeals
FILED
Jan. 8, 2002
Rosanne B. MacKechnie, Clerk
Second Circuit

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee Edward Vega

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: s/Arthur Heller
Art Heller
Administrative Attorney